INDIAN STATES IN THE FEDERATION

THREE LECTURES
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INDIAN STATES IN THE FEDERATION

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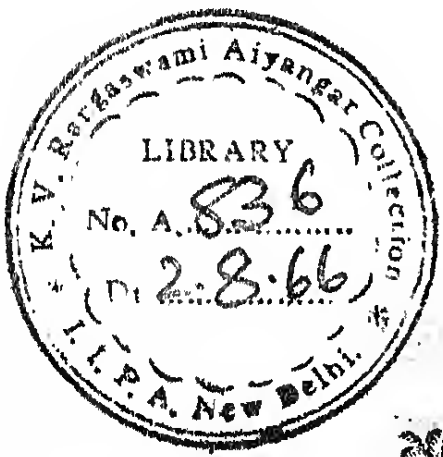

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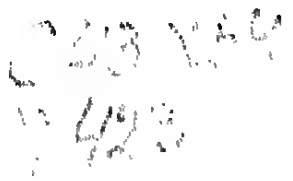

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To

My uncle

C. VIJIARAGHAVACHARIAR

President, Indian National Congress, Nagpur, 1921

FOREWORD

Mr Varadachariar's lectures are of very substantial interest to all those concerned with the vital question of the immediate future of India, the relation of the States to the Federation. His attitude to the question is essentially founded on sound legal considerations ; he states fairly the claims which have been put forward regarding the position of the States, and shows how they rest on mistaken assumptions, incompatible with history. He investigates the very difficult question of the position of the States which accede to the Federation, and indicates the importance and complexity of the problem of the effect of alteration of the constitution, as enacted in the Government of India Act of 1935, on the obligation of the States to respect the federal bond.

All the issues which the author discusses are highly controversial ; his discussion will prove well adapted to stimulate thought and to clarify ideas on matters which are not merely of great theoretic but also of immediate practical importance, and his lectures deserve close study by Indian political thinkers and those charged

with government of the States, whose vital importance to India has so fittingly been expressed by Lord Willingdon in his valedictory address.

A. BERRIEDALE KEITH

The University of Edinburgh

15 April 1936

PREFACE

These lectures were delivered at the Madras Law College on 10, 11 and 12 March this year at the invitation of the University of Madras under the Sundaram Iyer–Krishnaswami Iyer Endowment founded by Sir Alladi Krishnaswami Iyer, Advocate-General of Madras.

My thanks are due to Mahamahopadhyaya Prof. S. Kuppuswami Sastri and Rajasevasaktha Dewan Bahadur Dr S. Krishnaswami Aiyangar who helped me by their investigation of the authorities bearing on the Hindu conception of law and sovereignty. I am also obliged to Prof. K. V. Venkatasubrahmanya Aiyar of the Madras Law College for discussing with me some of the questions dealt with in these lectures.

I gladly acknowledge my gratitude to Prof. A. Berriedale Keith who very kindly read these lectures and favoured me with his interesting and useful comments. He has added to my indebtedness to him by the valuable Foreword which he has contributed to this publication.

N. D. VARADACHARIAR

Madras
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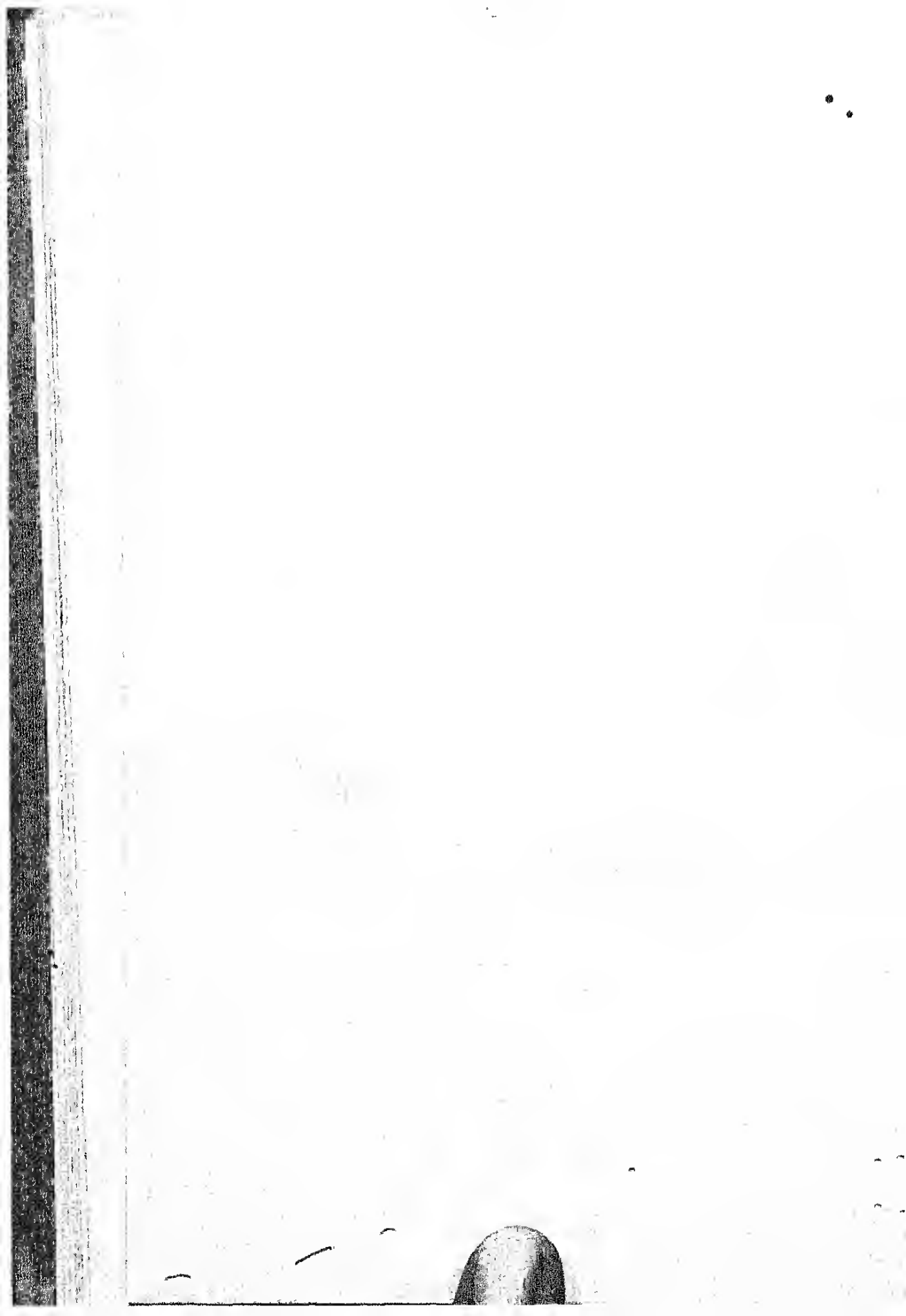

LECTURE I

PARAMOUNTCY AND SOVEREIGNTY

The Government of India Act of 1935. The object of the Government of India Act of 1935 is to bring India under a single constitutional system. The Act provides for the creation of a new State to be known as the Federation of India consisting of British Indian Provinces and such Indian States as may accede to the Federation. The authority of an Act of Parliament is sufficient to transform the existing British Indian Provinces into units of the Federation when established. But different considerations arise in respect of the Indian States. Parliament has so far neither claimed nor exercised the right of legislating directly for the Ruler or citizens of an Indian State.[1] The Act therefore assumes that they could be brought into the Federation only by their own voluntary decision expressed by their executing Instruments of Accession in a form

[1] As to the nature and extent of British jurisdiction exercisable within the territories of an Indian State, see Sir C. P. Ilbert's *Government of India*, 3rd ed., ch. V.

acceptable to the Crown. Each Instrument of Accession is to embody the conditions subject to which the State concerned agrees to become a unit of the Federation. The Instrument may explain, modify or add to provisions of the Act ; but it is made clear that the Crown is free to reject offers of accession which do not preserve the essential federal character of the resulting relation.

Constitutional law of an Indian State.

The constitutional law of an Indian State after its accession to the Indian Federation has to be sought in (*a*) its Instrument of Accession, (*b*) the Government of India Act of 1935 in so far as it is not affected by its Instrument of Accession, (*c*) Orders in Council and Proclamations issued in pursuance of the Government of India Act, (*d*) Acts of the Federal Legislature of a constitutional character and rules and regulations issued thereunder, (*e*) decisions of the Federal Court and the Privy Council, (*f*) such usages and conventions as have become established as part of the federal constitution, (*g*) the constitutional law of the State, if any, establishing and defining the powers of the authorities of its internal government apart from the field covered by federal jurisdiction, and (*h*) the law of paramountcy.

The three aspects of an Indian State. The position of an Indian State which accedes to the Federation has three aspects. In the first place, it has to be looked at as a State, i.e. as a people organized within a territory under a common system of law and administration and owning allegiance to its Ruler. Secondly, it must be viewed as a political unit in respect of which the British Crown exercises certain powers by virtue of its acknowledged right as Paramount Power in India. And thirdly, it has to be studied as a member of the Federation of India in direct constitutional relation with other members of the Federation under a common Crown, legislature, executive and judiciary exercising limited authority over it.

Separate identity of the Indian State maintained in the Federation. The territorial and political integrity of the Indian State is fully maintained in the Federation. The Government of India Act lays down that the executive authority of the Federation does not extend in any federated State to matters outside the competence of the federal legislature in respect of that State, and even in such matters, the exercise of such authority may be subject to conditions specified in the Instrument of Accession. The federal legislature is expressly

forbidden from making laws for a federated State otherwise than in accordance with the Instrument of Accession and any limitations contained therein. The federal judiciary is incompetent to exercise jurisdiction with respect to matters arising in a federated State which do not involve the interpretation of the federal constitution, the laws of the federal legislature or the terms of agreements which the State consents to submit for the decision of the Federal Court. The federal authorities have thus no power to do anything which would have the effect of destroying the separate identity of a federated State. While power is reserved in the Act to His Majesty to create a new province or to increase or diminish the area or alter the boundaries of provinces, such a power is not exercisable by any authority under the Act in respect of a federated State. Further, the Crown's guarantee of the continued existence of States and their Rulers by its treaties, engagements and sanads is not affected by this Act.

Internal government of an Indian State. The internal government of an Indian State is carried on by its Ruler who has absolute powers over his people. His personal will is the source of all law, and all authority within the State

is exercised by or under sole accountability to him; he is under no obligation to consult his people in the exercise of his vast powers. Sir Lewis Tupper referring to the government of the Indian States says 'Native rule in so far as it has not been modified by British influence is in theory conducted by the mere volition of the Prince'.[1] Dewan Sir Shanmukham Chetty in a recent speech to the Cochin Legislative Council dealing with problems of constitutional progress, described the political system of the Indian States as autocracies.[2] In many States the distinction between public revenues and the private property and income of the Rulers is not observed and the practice of budgetting for a surplus in order to increase the private hoard of the Ruler is very common; even more important is the fact that neither the judiciary[3] nor the civil services have been

[1] *Our Indian Protectorate*, p. 121. Sir Lewis Tupper, to whose views I have made frequent reference in this lecture, was a prominent official of the Political Department, intimately acquainted with its work. He is said to have compiled a code of principles and precedents which is still confidentially circulated to the officials of the Department for their guidance. As such his views carry great weight.

[2] See Appendix II, *infra*.

[3] Sir Purshotamdas Thakurdas, advocating appeals in non-federal matters from State Courts to the Supreme

organized regularly. In most States therefore constitutional law has yet to emerge. The growth of democracy in British India and world conditions generally have awakened the people of the States to an increasing realization of their civic and political rights. In response to this growing feeling, the Rulers of States are very gradually introducing institutions to provide scope for the expression of the democratic feeling and through which popular representatives may participate in affairs of their government. Advisory representative Assemblies and Councils have been created which bring popular wishes and needs to the notice of the Ruler. In some States a limited legislative power has also been given to these bodies in which popular representatives form a strong element. The executive power of the Ruler is frequently entrusted to Councils which follow definite policies and procedure and defend their acts before these representative Assemblies

Court, referred to the judiciary in the States and said, ' In many cases the judges are not of a high order of legal knowledge and experience. In some, the Ruling Chiefs do not leave the judges a very free hand. In most cases the prospects of the presiding judge depend on the sweet will of the Ruling Chief.' (See *Report* of the Second Session of the Federal Structure Sub-Committee of the Round Table Conference, Indian ed., p. 788.)

although they are not responsible to them. The rules by which these bodies are organized may well be considered the nucleus of constitutional law in the States. But this should not obscure the fact that the government of the States is still as a matter of law in the uncontrolled discretion of the Rulers, and that they are in no sense constitutional monarchs in exercising their authority. In progressive States like Baroda, Mysore, Travancore, Cochin and Pudukottah, popular institutions as a rule influence the course of legislation and the exercise of the executive power to a considerable degree. But in all these States the Ruler could, if he willed it, ignore the popular bodies altogether and conduct government without infringing any rule of law. At the other end of the scale, there are States notorious for the extreme arbitrariness of their Rulers who govern them in complete disregard of the welfare of the governed. Except where such misgovernment results in financial collapse or grave disorder, the Paramount Power, which is the only agency superior to the Ruler, does not often intervene directly to put an end to it. Thus there is no legal check to the arbitrary will and unjust exercise of power by the Ruler in the day to day government of the State. The constitutional

law of an autocratic State under an uncontrolled Ruler can be enunciated in one sentence: the Ruler is supreme, and all the subjects shall obey him whether he is right or wrong, just or unjust. The Ruler, in other words, is the State. Fortunately the conception of constitutional law is not applicable to such a condition of affairs. The object of that law is to define the competence and the duties of the governing authorities and to provide for the protection of the citizens against their transgressing them. In the modern acceptation of the phrase, where the personal uncontrolled will of the Ruler is supreme, and the law does not provide for what the Americans call 'Due Process' upon which citizens may rely, nor for the legal definition of the normal scope of the function of the various institutions of government, constitutional law may not be said to have come into being. As it is, only the faintest beginnings of constitutional law can be noticed in the more progressive Indian States and none at all in the others.

After the States enter the Federation, this condition is bound to undergo change. When the States and British India form together a unified political organism, 'there will be tendencies for sparks to fly from one side to the

other' as the Maharaja of Alwar picturesquely observed at the First Round Table Conference.[1] Though representatives of the States have always held that a benevolent autocracy is a very suitable form of government for their territories, the democratic urge has become insistent among the people and it requires only that spark from British India to ignite it to practical fulfilment. And when once some form of democratic government becomes inevitable, true constitutional law will emerge with it.

Paramountcy. The only check then upon the arbitrariness of the Ruler is the Paramount Power, and this leads to a consideration of the second of the aspects in which the position of the States has to be considered. The origin and growth of paramountcy is among the most interesting chapters of political science. From dim beginnings, the jurisdiction has grown with time into an all-powerful and all-pervading one, which the Rulers fear and obey without exception. Its true character, either in constitutional

[1] *Report* of the Proceedings of the First Round Table Conference, p. 454. This Ruler has since been expelled from the State for an indefinite period, on the ground of gross misgovernment, by the Paramount Power which is now administering the State directly through one of its officers.

law or in international law, has defied analysis or exact definition, and different views have been put forward as to this from time to time. But one thing which is certain is that it is a live power, available for constant use, and is in fact so used, which remains the dominant feature of the political life of the Indian States.

Even though a State enters the Federation of India, its relations with the Paramount Power have been expressly preserved by the Government of India Act which declares that 'Subject to the provisions of the Instrument of Accession of that State, nothing in this Act affects the rights and obligations of the Crown in relation to any Indian State '.[1] The extent to which the Instrument of Accession of a State takes away the rights and obligations of the Crown as Paramount Power must remain a question of fact; but where similar rights and obligations are not substituted in the State's relation to the federal government, it may be assumed that the Crown's position in its character as Paramount Power exists unaltered. It is not intended that the extent of the rights and obligations of a State should be affected in consequence of its accession to the Federation,

[1] Government of India Act of 1935, § 285.

but only that matters in which it accepts the competence of the Federation should be governed by the provisions of the Government of India Act. Thus, even if a State should come into the Federation, accepting the Federal List without any limitation as to legislation or administration, it would still leave a very large field for paramountcy to act in. In his dispatch to the Government of India of 14 March 1935, Sir Samuel Hoare says, ' The greater part of the field of paramountcy is untouched by the Bill. The Bill contemplates that certain matters which had previously been determined between the States and the Paramount Power will in future be regulated to the extent that States accede to the Federation by the legislative and executive authority of the Federation. But, in other respects (and in all respects as regards non-federating States) paramountcy will be essentially unaffected by the Bill.'[1] It is therefore necessary to examine the nature and scope of paramountcy as a source of political power in India, and the status of the States subject to it.

Definition of the Paramount Power. The

[1] Parliamentary White Paper on the views of Indian Princes, March 1935 (referred to hereafter as Princes White Paper), p. 28.

Report of the Indian States Committee defines the Paramount Power as 'The Crown acting through the Secretary of State for India and the Governor-General in Council who are responsible to the Parliament of Great Britain'.[1] It had been urged that the supremacy of the Crown over the Indian States had been acquired in its character as sovereign of India and that consequently paramountcy should be possessed and exercised by whoever was sovereign as regards India from time to time.[2] Thus when India attains to the position of a Dominion in status and function, the King's Indian sovereignty would become separated from his British sovereignty [3] and it is the former upon which the rights and obligations of paramountcy should devolve. The States resisted this interpretation upon two grounds. Firstly, they contended that the relation between the Ruler of a State and the Crown as Paramount Power

[1] *Report* of the Indian States Committee (referred to hereafter as the Butler Committee *Report*), para. 18.

[2] For a fuller discussion of this interesting subject, see Sir P. S. Sivaswami Iyer's *Indian Constitutional Problems*, 1928, p. 210, and my article 'Locus of Paramountcy' in *The Hindu*, Madras, 18 September 1930.

[3] The effect of the Statute of Westminster is the recognition of the sovereignty of the Dominions under the British Crown.

was of a personal nature, and that it would not be appropriate or safe to invest a democratic and responsible executive in India with the power of deciding many intimate questions of personal dignity and dynastic importance to the Rulers. The Rulers overlooked the fact that the Crown in England cannot act in person except through its constitutional advisers and that it is now advised by a democratic and responsible cabinet which is ultimately ordering the affairs of paramountcy; so that the argument that there is anything inherent in responsible executives which unfits them to wield paramountcy in its most delicate aspects is not very convincing.

Secondly, the Rulers contended that as their treaties and engagements were with the Crown it was not competent for the Crown to assign the rights and obligations arising from them to any other party except with the assent of each Ruler concerned. This plea, however, is inconsistent with facts. It is noteworthy that the treaties prior to 1857 are expressed to be made not with the Crown but with the East India Company, its Governors-General of India or other Indian authorities. It may be that these authorities were British subjects and the benefit of their acquisitions went to the Crown

by reason of British constitutional law.[1] But the Rulers on their part looked entirely to the East India Company's officers to keep their part of the several covenants. This is abundantly borne out by the language and content of the various instruments, none of which mentions the British Crown as a party. The *Report* of the Indian States Committee says that 'until 1835 the East India Company acted as trustees of, or agents for, the Crown, but the Crown was, through the Company, the Paramount Power. The Act of 1858, which put an end to the administration of the Company, did not give any new powers which it had not previously possessed. It merely changed the machinery through which the Crown exercised it powers'.[2] It is difficult to detect in the treaties any consciousness on the part of the States that they were dealing with trustees and agents instead of with principals. Also it is not clear why the Government of India Act of 1858 should enact that 'all treaties made by the said Company shall be binding on Her Majesty',[3] if, as

[1] 'A subject who acquires territory, acquires for the sovereign and not for himself', per Sir William Harcourt in *Damodar Gordhan v. Deoram Kanji, L.R. 3 I.A. 102.*

[2] Butler Committee *Report*, para. 18.

[3] Government of India Act of 1858, § 67.

contended, the Crown was already party to the treaties and as such bound under them. Assuming that the Crown is the real party, what is even more significant is that when the Crown changed its agent by withdrawing its powers from the Company and placing them at the disposal of the Government of India, it did not consult the Rulers nor did they claim to have a voice in the selection of the new agent. Why should they have any more say when another change of a similar character takes place from the executive of Great Britain to that of the Indian Federation? The true position appears to be that since as a matter of law the Crown can only act upon advice, it is of no concern to strangers, who have nothing to do with the course of the development of British constitutional law, as to which advice it acts under at a given time.

The objections of the Rulers have, however, been upheld by the Butler Committee in the definition of the Paramount Power to which I have just referred. The Government of India Act of 1935 gives effect to it by separating the office of the Governor-General of the Federation from that of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States. With the growth

of the scope of federal jurisdiction and the advance of the Federation towards Dominion-hood, the importance of this distinction is likely to diminish in practice. At the same time, it is only fair to add that the soundness of the conclusion arrived at by the Butler Committee is arguable.

Definition of Paramountcy. There is a more difficult controversy regarding the definition of the scope of paramountcy. The contention of the States may be stated in the words of Mr K. M. Panikkar as follows: 'The word "paramountcy" is merely the expression denoting the position in which an Indian State stands to the Crown. That position is ascertained by treaties and valid practice. It is only applicable to the ascertained position and is not a theory to cover vague and undefined claims. The extent of paramountcy differs with each State according to the clauses of its treaty and the practices which have developed by agreement or acquiescence. Being thus a definite complex of known powers, paramountcy cannot be a source of further authority.'[1]

In sharp contrast with this, the Indian States Committee declares the impossibility of defining

[1] K. M. Panikkar, *Inter-Statal Law*, p. 13.

paramountcy and proceeds to say 'We have endeavoured, as others before us have endeavoured, to find some formula which could cover the exercise of paramountcy, and we have failed, as others before us have failed, to do so. The reason for such failure is not far to seek. Conditions alter rapidly in a changing world. Imperial necessity and new conditions may at any time raise unexpected situations. Paramountcy must remain paramount; it must fulfil its obligations defining or adapting itself according to the shifting necessities of the time and the progressive development of the States. Nor need the States take alarm at this conclusion. Through paramountcy, and paramountcy alone, have grown up and flourished those strong benign relations between the Crown and the Princes on which at all times the States rely. On paramountcy, and paramountcy alone, can the States rely for their preservation through the generations that are to come. Through paramountcy is pushed aside the danger of destruction or annexation'.[1]

Paramount Power's assertion of supreme and unlimited control over the States. These two views cannot be reconciled. The States

[1] Butler Committee *Report*, para. 57.

look upon the powers of paramountcy as capable of definition by enumeration. They would consider any exercise of power by the Crown not strictly authorized by reference to the treaty or valid usage applicable to the particular State concerned, as a usurpation 'in flagrant violation of solemn promises and public pledges'.[1] The Paramount Power asserts on the other hand, that its competence is inexhaustible and unlimited, capable of 'defining or adapting itself according to the shifting necessities of the time and the progressive development of the States'. 'Its supremacy' in the words of Lord Reading's letter of 1926 to H.E.H. the Nizam 'is not based only upon treaties and engagements but exists independently of them'.[2] Lord Curzon was more explicit when he said: 'The sovereignty of the Crown is everywhere unchallenged. It has itself laid down the limitations of its own prerogative.'[3] In his dispatch of 14 March 1935, to the Government of India Sir Samuel Hoare, then Secretary of State for India, replying to the complaints of Rulers that their powers were being undermined and invaded and asking for a definition

[1] D. K. Sen, *The Indian States*, p. 204.
[2] Quoted in the Butler Committee *Report*, p. 56.
[3] H. Caldwell Libfett, *Curzon in India*, p. 227.

of paramountcy, disposed of the matter firmly in one sentence. He said, 'I cannot believe that their Highnesses in expressing their views on this matter, had any intention of questioning the nature of their relationship to the King Emperor. *This is a matter which admits of no dispute.*'[1] Nothing can be clearer than this assertion of supreme power. This is not to say, however, that in practice the Paramount Power does not allow itself to be influenced in its decisions by the wishes, claims and susceptibilities of the Rulers.

Treaties mere guides of political conduct. It appears to me to be futile to discuss whether the pretensions of the Paramount Power are well founded. Well founded or not they must in the present condition of affairs prevail unquestionably. An aggrieved Ruler is denied recourse to British municipal courts to seek redress, for an act of the Paramount Power has been held to be an act of State and therefore outside their jurisdiction.[2] Such a Ruler cannot appeal to any international tribunal

[1] Princes White Paper, p. 28. (Italics mine.)

[2] See *Nabob of Carnatic v. East India Co.*, (*1793*) *2, Ves. 56; Secretary of State for India v. Kamachee Boyee Saheba*, (*1859*) *7, Moo. Ind. App. 476; In re Madhava Singh*, (*1904*) *31, Ind. App. 239; Salaman v. Secretary of State for India*, (*1906*) *1, K.B. 613* (*C.A.*).

either, for the States of India have not and do not claim any external life except through the British Paramount Power which has always held that its relations with the States are not within the field of international affairs. Mr Panikkar, however, claims that there is a sanction for the rights created by the treaties and that sanction 'rests on the undenied paramountcy of the British Crown'.[1] This statement is a little obscure for where the remedy is sought against the Crown as exceeding its competence as Paramount Power, the invoking of the 'undenied paramountcy of the British Crown' against itself would lead to no useful conclusion. A right without a remedy is unknown to law, and if no way is available to the States to obtain compliance with the treaties according to their strict tenour, then the treaties must be considered to be mere guides of political

[1] op. cit., p. 2. The expression Inter-Statal law can only refer to the rules governing the relations between the Paramount Power and the individual States. There is no Inter-Statal law in the sense of rules relating to one State and another. No Indian State can have any relations with another State in India or elsewhere except through the Paramount Power. Such rules, for which the only so-called sanction is the will and the might of one of the parties alleged to be bound by them, can be called law only in a very special and esoteric sense, if at all.

conduct rather than sources of legal rights.[1]

Nature of the rights of the Paramount Power.

The norms of law are not available to explain or justify acts of State. When the Crown asserts a right in its character as Sovereign, the only test of its validity is its enforceability. Whatever the nature of the original relations between the East India Company and the Indian States, the expansion of British power from a trading corporation to undisputed sovereignty in India carried with it as an irresistible consequence, the corresponding diminution of the status and powers of the States whose dependence upon the Crown for their very existence was repeatedly demonstrated. Prof. J. Westlake, the distinguished international lawyer observes that the constitutional relations between the Indian States and the Government of India have been imperceptibly shifted from an international to an imperial basis; the process has been veiled by the prudence of statesmen, the conservatism of lawyers and the prevalence of certain theories about

[1] Under certain circumstances, the States may claim an arbitration, but these arbitral tribunals cannot give binding awards. The right of decision always rests with the Paramount Power as declared by the Hyderabad letter. See Butler Committee *Report*, p. 57.

sovereignty.[1] The Government of India said the same thing in 1877 in gentler words. 'In the life of States as well as of individuals' they argued, 'documentary titles may be set aside by overt acts; and a uniform and long continued course of practice acquiesced in by the party against whom it tells, whether that party be the British government or the native State, must be held to exhibit the relation which in fact exists between them.'[2] And as late as 1926, when the Nizam of Hyderabad, who in the initial stages of his relations with the British enjoyed in India a position vastly superior to theirs and was never conquered by them, attempted to found his rights upon his treaties, the Paramount Power speaking through a Viceroy who was himself a distinguished lawyer and judge, enunciated a view of paramountcy which accords with the sovereign character of the Paramount Power but which is wholly inconsistent with the claims set up for the States by writers like Mr Panikkar.[3] Mr J. P. Eddy in his recently published book on the

[1] See Sir William Lee-Warner, *The Native States of India*, 1910, p. 397.

[2] Quoted in the Butler Committee *Report*, para. 41.

[3] There are few political documents comparable with this communication to the Faithful Ally for its outspoken statement of the claims of paramountcy.

Indian constitution accepts the distinction between rights under treaties and the superior and independent obligation owed to the Paramount Power as such. He says, 'Since the Crown's paramountcy has largely grown up independently of treaties, engagements and sanads, difficult questions arise as to its relations with these treaties, engagements and sanads. It is submitted that the rights and privileges conferred by these documents must be construed as subject to this paramountcy. They may vary the rights which the Paramount Power possesses in respect to a particular State. They may extend those rights or they may restrict them. *But they cannot exempt the State from subordination to that Paramount Power which the Crown has acquired by usage, independently of treaties, to take what measures it sees fit for the safety of the British Empire, the interests of India as a whole or the interests of the States.*'[1] It may now be taken as conclusively established that paramountcy is an attribute of the sovereignty of the British Crown in India and that the various Instruments such as treaties, engagements, sanads and other agreements with the States are merely indicative of the normal

[1] J. P. Eddy and F. H. Lawton, *India's New Constitution*, 1935, p. 20. (Italics mine.)

field of its operation. Any other view contradicts facts; and it is upon facts alone that an issue like this should be determined irrespective of the further question, whether they are just or unjust.

Impossibility of defining the precise limits of paramountcy jurisdiction. If this is so, the questions whether usage and sufferance apart from treaties and other similar agreements can furnish sources of authority for the Paramount Power, and whether usages arising in respect of one State become *pro tanto* applicable to other States, are not material. The principles which the Paramount Power observes in its relations with the States are based upon these usages no less than upon treaties and other agreements. Furthermore, when the occasion calls for it, the Paramount Power does not hesitate to travel outside these sources and take action beyond the scope of these Instruments and established usages. Therefore, the only analysis of paramountcy which it is practicable to attempt is of the way in which it has so far been actually exercised. Beyond that, if one were to try to fix the limits of that jurisdiction with any precision, the labour would be thrown away. The development of paramountcy has not ended: it cannot end so long as the States

retain their present character. The process can only terminate in one of two eventualities. Either the States should each of them become full international persons, of which there seems to be little chance, or they should be absorbed in the Indian Federation as ordinary members having the same juridical position in all respects as provinces of British India.

Rules observed by the Paramount Power are neither international nor municipal law. The rules observed by the Paramount Power are therefore rightly said 'to fall outside both international and ordinary municipal law'.[1] It has been argued that this body of rules which a rather enthusiastic protagonist of the claims of the States calls Inter-Statal law is 'indubitably international law in the sense that it is the regulation of relations between states based on principles of comity, agreement and usage'.[2] Although to a considerable extent these rules are in fact based on principles of comity,

[1] Butler Committee *Report*, para. 43.

[2] Panikkar, op. cit., p. 6. Mr Panikkar started by saying, 'Inter-Statal law such as we have defined here differs equally from municipal law and from international law.' This is on p. 2; by the time he came to write p. 6 he arrives at a somewhat different conclusion and says that 'the public law of India' which he calls Inter-Statal law 'is therefore a part of the international law of the world'.

agreement and usage, the essential nature of paramountcy is absolute and transcends them all, as exemplified by the great number of striking instances in which these principles have been disregarded by the Paramount Power. Further, while international law permits an aggrieved state to seek redress by recourse to war, entitling third party States to participate in the settlement of the dispute as parties interested in preserving international peace, this ultimate sanction is not available to the Indian States.[1] In the Manipur case it was held that being a protected subordinate State owning submission and allegiance to the Paramount Power, forcible resistance by its Ruler or subjects to the orders of that Power was a breach of allegiance and punishable as such. Thus they do not possess the right to the characteristic sanction which gives the semblance of law to international law.

Mr Panikkar's views examined. Mr Panikkar adds, ' It is incorrect to say that it is merely based on the whim and caprice of an all-powerful Paramount Power which disobeys accepted principles when it does not suit its

[1] See L. Oppenheim, *International Law*, Vol. I, 4th ed., p. 740, *et seq.*

interests.' [1] It must have gladdened the hearts of the officials of the Political Department to have had this testimony from a spokesman of the Rulers. But the fact remains that the most important part of the long argument of Sir Leslie Scott, counsel for the Rulers before the Butler Committee, was directed against the unwarranted, unrestrained and arbitrary extension of the authority of the Paramount Power to cover cases beyond the terms of the contract made with individual Rulers upon various pretexts and often without any pretexts at all. Ever since the establishment of the Chamber of Princes, the Rulers have been asking for the codification of political practice and for the publication of the 'case-law' relating to the States so that the powers of the Political Department may cease to be subjectively determined and elastic, and may instead become well-ascertained and delimited. So aggrieved were the Rulers with the ways of the Political Department, which is the agency of the Crown which actually exercises the paramount jurisdiction over the States, that they put forward the definition of their relations with the Paramount Power as the price and the condition

[1] op. cit., p. 6.

precedent to their joining the Indian Federation. In their Note of 27 February 1935, submitted to the Viceroy, their Highnesses of Patiala, Bhopal and Bikaner refer to the 'continuous erosive action from usage, sufferance, acquiescence, political practice or ultimate powers of paramountcy undermining from below the essence and substance of the sacred treaties' and observe, 'The Chamber of Princes have from the very outset urged the satisfactory settlement of the claims of paramountcy to be a condition precedent to the accession of the States to any Federation. Among the essential conditions they had laid down from time to time, the one treating with a definition of paramountcy has been made a *sine qua non* to any Federation.'[1] This would hardly be necessary if, as Mr Panikkar contends, Inter-Statal law is a precise system of jurisprudence, the exercise of authority under which was neither whimsical nor capricious. It appears

[1] Princes' White Paper, p. 18. At an earlier stage, the Nawab of Bhopal said, 'A free Indian State means the disappearance of that doctrine of paramountcy which has been imported contrary to our treaties, into the relations between the States and the Paramount Power, and which has been so much in vogue in comparatively recent times.' (See *Report* of the Proceedings of the First Round Table Conference, p. 108.)

to me that Mr Panikkar's classification of the rules which the Paramount Power observes as a species or part of international law cannot be accepted.

Views of two German jurists. Similarly, two German jurists, Dr Viktor Bruns and Dr Karl Bilfinger in an opinion they gave to the Rulers on the Butler and Simon Committee *Reports*, assert that notwithstanding the fact that their external affairs are under the sole control and direction of the Paramount Power, the States are still international persons so long as they are not incorporated in British India. They say, 'It is the act of incorporation which is followed by the loss of independent personality.'[1] This is the argument which Sir Thomas Holland appears to have had in mind when he said, 'We must, however, distinguish the case of the native States of British India of which it has been declared, the principles of international law have no bearing upon the relations between the Government of India . . . . . and the native States. (Official notification, 21 August 1891.)

[1] The Opinion is not available to the public, but owing to the courtesy of Sir Mirza Ismail, Dewan of Mysore, I have had an opportunity of perusing it. This passage however has been quoted by K. M. Panikkar on p. 31 of his *Inter-Statal Law*.

Similarly, the Indian Tribes in the United States are wholly unrecognized by foreign powers. In both cases it is convenient to make so-called treaties with the tribes, but they have only what has been called "fictitious semi-sovereignty" (Rivier).'[1] These two German scholars who are quoted by the advocates of the theory of the sovereignty of the States frequently overlook the settled principle of international law that 'a State is and becomes an international person through recognition only and exclusively'.[2] The Indian States have not been so recognized and are therefore not international persons, however much they may resemble such persons.

Rulers' claim of sovereignty. This attempt to give the character of international law to the observances of the Paramount Power is really made in order to sustain the claim of the Rulers of the States that they are in the enjoyment of sovereignty. It is well established in the law of nations that, notwithstanding the existence of rules which guide the international relations of independent States, the sovereignty of each State remains unimpaired.

[1] Sir Thomas Holland, *Lectures on International Law*, 1933, p. 69.

[2] Oppenheim, op. cit., p. 143.

The obligatory character of the rules, in so far as such obligation is recognized and acted upon, arises from the fact that the several sovereign States have voluntarily agreed to their operation. The Rulers have therefore consistently held that the rights of paramountcy have all their source in the agreement of each State concerned and that the existence of these rights is no derogation of their sovereignty. Since these contentions have been authoritatively repelled on every occasion they were raised in the dealings between the several States and the Paramount Power, the deduction from them, that the rules themselves are of the same character as international law, cannot be drawn.

Status of Indian States. What then is the nature of the rules which regulate the conduct of the Paramount Power towards the Indian States? This question raises the issue whether and in what sense the States are sovereign. If they are not sovereign, what is their status as political communities? The States themselves claim that they are sovereign. Their position has been described as quasi-international and, by Prof. J. Westlake, as constitutional. Sir Lewis Tupper thought that the States were fiefs in an indigenous species of feudalism. Sir William Lee-Warner, after a discussion of

some of these views, came to the conclusion that they are *sui generis*. The feudal theory has not received much support. Although there are many features in the relations between the Crown and the States which resemble those of feudalism, it is recognized that rights and obligations which appertain to the feudal relation cannot be extended in respect of the States merely by analogy.

There is greater support for the view that the States are in possession of sovereignty. Several treaties and other instruments refer in terms to the sovereignty of respective States and these have been declared to be binding by the Government of India Act. Royal Proclamations have made mention of the sovereignty of the States.[1] The draft Instrument of Accession under Section 6 of the Government of India Bill of 1935 contains an express reference to the sovereignty of the Rulers.[2] Apart from these, it is also historically true that before they entered into relations with the

[1] For example the Proclamation relating to Baroda deposing the Maharaja, 19 April 1875. See also P. Mukherji, *Indian Constitutional Documents*, Vol. I, 1918, p. 583.

[2] Princes White Paper, p. 41. See also § 47 of the Government of India Act of 1935 which refers to the 'sovereignty' of H.E.H. the Nizam over Berar.

British power several of the Indian States were fully independent, and it is argued that, at least in respect of these States, the result of such relations is not the abrogation of their sovereignty but a mere diminution of the sphere of its operation.

Sovereignty claim based upon Sir Henry Maine's views. In what sense are the Indian States sovereign? To clear the ground I shall first mention here what must be apparent to all, that the Indian States are not and do not claim to be independent national sovereignties. They unreservedly acknowledge their allegiance and subordination to and dependence on the Crown as Paramount Power.[1] Therefore they claim to be sovereigns in so far as they have not parted with their sovereign powers in favour of the Crown and by reason of the fact that they possess and exercise many powers which are permitted only to sovereigns. Stated in this way, the argument assumes that sovereignty far from being indivisible, illimitable and unlimited, according to the juristic view, is the

[1] The Crown is often referred to as the Suzerain in relation to the Rulers, but this is an inexact and confusing expression. P. Cobbett says 'Having regard to its numerous applications in practice, it would scarcely seem to imply any definite relation in law.' *Cases on International Law*, 3rd ed., p. 59.

contrary of these. It follows the definition of sovereignty put forward by Sir Henry Maine as merely 'a well ascertained assemblage of separate powers or privileges'.[1] Of this bundle of powers some are with the States and others with the Paramount Power. The sovereignty of each is limited and conditioned by that of the other. If the object of this claim is to prevent the encroachment of paramountcy upon the internal government of the States that object, it must be admitted, has failed. The Paramount Power has refused to acknowledge in practice any limits to its competence other than its own will or to recognize that in any matter the sovereignty of the State is a conclusive bar to its interference. It is difficult to understand what other consequences follow from the assertion of the existence of a divided sovereignty according to Sir Henry Maine's view. Being an ascertained collection of distinct powers this sovereignty cannot be the source of fresh powers not already included in the collection. It is incapable of growth or development and is nothing more than a description of the fact that a certain authority

[1] Quoted in the Butler Committee *Report*, para. 44. For Sir Henry Maine's views on sovereignty, see his *Early History of Institutions*, 4th ed, 1885.

possesses such and such political powers at a given time.

Juristic conception of sovereignty. The value of the juristic conception however consists in the fact that sovereignty according to it is the illimitable and inexhaustible source of power conferring upon its possessor a competence, rather than a specified number, of jurisdictions. This conception has a purpose to serve in political and legal speculations. It provides a trustworthy norm for the determination of the status of political groups. Not only conceptually but as a matter of fact, independent political societies exhibit the character of sovereignty in this sense. The acts of an unpopular despot or dictator may be extremely unjust, but his sovereign power enables him to obtain obedience to them. Not infrequently Acts of Parliament have been passed to which a majority of those subject to them have taken strong exception before they were passed; but nevertheless as Acts they are obeyed. It is the undivided, unlimited and indivisible sovereignty of the British Parliament which enables her to enact laws which bind the subjects of her far-flung Empire wherever they may be, irrespective of what they think of the propriety of those laws.

Objections to the theory examined. Three main objections are raised against the truth of this theory.[1] It is first contended that the absolute sovereign is not so absolute that it could enact laws varying the course of nature, or beyond its physical or moral capacity to enforce. The objection is beside the point. The meaning of saying that the sovereign power is absolute is that when that power sets itself in motion no *human* hindrance to it is *legally* possible, and not that the sovereign power, which is a human power, is superior to nature. As regards its moral limitations, these could arise only when the sovereign's will is opposed to public welfare. The sovereign may be, and invariably is, influenced by the opinions and desires of those subject to it ; the validity and majesty of its acts, however, are not derived from the acquiescence or assent of its subjects, but flow from its own character as sovereign.

In the next place, it is suggested that rules of international law constitute a limitation of the sovereign power. The confusion behind

[1] I have not dealt generally with all the various objections raised against the Austinian theory of sovereignty, but have contented myself with clearing a few misconceptions regarding it arising chiefly from Sir Henry Maine's criticisms.

this argument arises from the fact that these critics view international law as absolutely binding under all circumstances. It cannot be denied that from the point of view of an independent State its submission to international obligations is voluntary and self-imposed.[1] If it were otherwise, the State would not be a sovereign but a subject State.

[1] Referring to the obligations of States under the League Covenant, Sir Samuel Hoare, then British Foreign Secretary, in his speech at the opening of the League Assembly on 11 September 1935, outlined the British view as follows; '(The League) is not a super-State, nor even a separate entity, existing of itself independent of or transcending the States which make up its membership. *The Member States have not abandoned the sovereignty that resides in each of them*, nor does the Covenant require that they should, without their consent in any matter touching their sovereignty, accept decisions of other members of the League. *Members of the League are bound by obligations that they themselves have assumed and by nothing more.* They do not act at the bidding of the League, but in virtue of agreements to which they themselves are parties, or in pursuance of policies, to which they themselves resort.' (Italics mine.)

The grounds upon which, in England and America, rules of international law are enforced by municipal courts are either that such rules, being principles of natural justice recognized by immemorial usage or by virtue of agreement or other indication of assent, have become part of common law, or that acts of the legislature have authorized the courts to ascertain and apply such rules. See W. W. Willoughby, *Fundamental Concepts of Public Law*, p. 285, *et seq.*

One interesting contemporary example of the truth of this view of sovereignty is furnished by modern Italy. The existence of treaties to which she was party and obligations arising from those treaties have not prevented her from asserting the right to do whatever she desired in direct violation of those treaties. Here we have a very convincing, if somewhat regrettable, refutation of the doctrine that international law is a limitation of State-sovereignty. The concepts, sovereignty and international law, do not belong to the same universe of discourse.

Sir Henry Maine's objections based on historical grounds. Finally, the juristic view of sovereignty has been assailed upon historical grounds, notably by Sir Henry Maine. This distinguished writer does not deny the truth of the theory as a theory, but he says that it exaggerates and emphasizes the element of coercion and force in the State to the exclusion of other influences like public opinion, longstanding custom and ethical motives and that it is the result of an abstraction or, as Mr Panikkar improved the language, 'a meaningless metaphysical conception'.[1] Far from being an

[1] *Indian States and the Government of India*, 1927, p. 125.

abstraction dwelling in the minds of scholars and having no real existence, we had a very convincing ocular demonstration of its might when two or three years ago, the sovereign stalked the length and breadth of India, whip in hand, flogging masses of its subjects to obedience of its law. The jurist, however, is not concerned with collateral facts which do not affect the question of the fundamental nature and primary attribute of the State. As I have endeavoured to show, the conception of sovereignty as a collection of specific powers is sterile, but as a juristic conception it affords a valuable criterion to test whether or not a State had a politically independent personality and all the competence appertaining to it. The only relevant fact to determine this character is whether in the last resort it legally possesses coercive authority over the society of which it claims to be sovereign. Prof. H. J. Laski says, 'It is by the possession of sovereignty that the State is distinguished from all other forms of human association',[1] and he agrees that the possession of ultimate coercive authority by its sovereign is what distinguishes a State from other associations.[2]

[1] *The State in Theory and Practice*, 1935, p. 21.

[2] This method of stating the point appears to suggest

Hindu conception of sovereignty. Nor is the criticism of Sir Henry Maine that the validity of the theory is weakened by the facts of oriental history as well founded as has been supposed. In his opinion an eastern society is governed primarily by customary law, and the sovereign, besides collecting taxes and maintaining peace, does no more than issue occasional and particular commands, if at all, and these cannot be called laws in the Austinian sense. He asserts that the function of legislation is of recent growth and almost wholly confined to western countries. It appears to me that these views, upon which a considerable part of the attack on Austin is based by later writers, need to be revised. An examination of Hindu jurisprudence would show that the juristic conception of sovereignty was what was accepted as a matter of course by Hindu legists whose relevant legal and philosophical speculations were invariably based on that conception alone.

It is wholly wrong to say that there was no legislation in the ancient Indian State. Law as the command of the sovereign backed by the sanction of his coercive power is everywhere

that States which are not sovereign are not even entitled to be called States. In practice, however, they are called subject States.

mentioned as a pre-eminent source of obligation. Elaborate provisions for penalties were laid down and carefully organized police and judicial systems were established to prevent, detect and punish transgressions of the law.[1] It is true that apart from the laws of the then existing sovereign there were other rules which had binding authority in the State, such as Dharma, Vyvahara and Charitra. But even these rules were enforceable ultimately only by the coercive power of the sovereign. Rajagnya or Rajasasana which emanated from Rajabuddhi or the Will of the King was a source of law superior in its efficacy in the State to the others I have just mentioned. What actually happened was that the Rajagnya of one sovereign became assimilated to Charitra in the reign of the succeeding

[1] J. H. Nelson in his interesting but perverse argument in a pamphlet, *A View of the Hindu Law as administered by the High Court at Madras*, denied that there was such a thing as Hindu law at all. He said 'Hindu law is a mere phantom of the brain imagined by Sanskritists without law, and lawyers without Sanskrit', (p. 2). He denied also that the Hindu law as laid down by the Dharma Sastras was ever administered by Hindu judges over Hindu subjects by regular judicial tribunals. These extreme and fantastic opinions have long since been discredited by the authentic researches of students of Hindu institutions like Mayne, and are not professed by any modern scholar of note. See *Law Quarterly Review*, Vol. III, p. 446.

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sovereign. It is no doubt true that occasions for the exercise of Rajagnya were not as frequent as those which call for the systematic legislative activity of present-day sovereigns. That obviously is because of the vastly increasing complexities of life today which necessitate more extensive State action. In ancient India, the sovereign as law-maker never hesitated to ordain laws when there was any need for it; only the need was, in the nature of the circumstances, relatively infrequent. Hindu jurisprudence provided an elaborate machinery of legislation. The King was enabled to ascertain the needs of his people by various means, and Parishads of Sishtas, wise and good men, advised him as to what the law should be. Their advice or decision did not become law until the King approved and promulgated it under his authority.[1] And far from being confined to collection of taxes or mere policing, the ancient Hindu King exercised his sovereign political authority over as wide a field as any modern dictatorial state, regulating the lives of individuals, families and even larger groups,

[1] 'Hindu law agrees with the modern English schools of jurisprudence that the sanction of positive law proceeds from the King.' J. C. Ghose, *Hindu Law*, Vol. I, 3rd ed., p. 5.

political, economic and religious, in their most intimate and minute details.

It is said that the sovereign of ancient societies was himself subject to customary law, a fact which if true, would belie his absolutism. This again, I think, is an erroneous view of the position. The injunctions to the King to observe the Dharma were always understood to be merely in the nature of moral percepts as distinct from behests of positive law. That this is so will be apparent from the fact that, so far as the subject is concerned, his duty of obedience to the King's law is held to be absolute and is not dependent on the question whether the law itself is in accordance with Dharma. No earthly or human sanction is interposed to prevent a King from issuing any law. The right of rebellion even against notorious misrule is discouraged if not denied; so impressed were they with the majesty of the sovereign power. Indeed I cannot conceive of a more perfect specimen of the Austinian sovereign, than the King according to the Hindu conception. His absolutism was so well recognized that the word Rajagnya was used in Sanskrit classical works as a synonym for all that is morally conclusive and physically irresistible. That the sovereign invariably felt

himself bound by the counsel of wise men is evidence of his culture, but not a detraction of his legal competence.

In fact from the remote days of sages like Gautama and other law-givers, and of the classics such as the *Mahabharata*, this conception of sovereignty seems to have become ingrained in Hindu thought. The Santi Parva Raja Dharma Prakarana of the *Mahabharata* describes the King as the root of Dharma and the ultimate cause of time, that is, of everything conditioned by time and of this earth. In the face of these facts, Sir Henry Maine's conclusion drawn from examples of decadent and anarchical times appears to me to be based upon a very superficial view of Hindu society and law. He seems to have thought that that society never progressed beyond a patriarchal and theocratic to a strictly political condition. But it was at least no more theocratic and no less political than modern Shinto Japan under her Emperor. The truth seems to be rather that the great Hindu culture, which perceived the propriety and the inevitability of recognizing the ultimate temporal supremacy of the absolute sovereign, sought to inspire him with ideals and furnish him with standards which would help him to rule justly and well

instead of as 'a despot with a disturbed brain'.[1] Adjurations addressed to him in this spirit have been wrongly interpreted as limitations of his authority.

Muslim conception of sovereignty. The Muslim conception of sovereignty is stated by Sir Lewis Tupper as follows: 'By the theory of the Mohammedan law, says Elphinstone (*History of India*, p. 482) "the Ruler of the Faithful should be elected by the congregation and might be deposed for any flagrant violation of the precepts of the Koran; but in practice the King's office was hereditary and his power absolute". Elphinstone further explains that the King was considered bound to observe the Mohammedan law, but that there was no authority which could enforce his obedience to it, and that when he was determined to persevere, there was no remedy short of rebellion. A sort of common law however "not derived from the Koran but from the custom of the country and the discretion of Kings", the existence of great officers and departments of State, and of village and other rural institutions, were doubtless checks upon the royal prerogative. It is certain that the sovereign

[1] Sir Henry Maine, op. cit., p. 359.

could and did interfere in the decisions of courts of justice. The Emperors like the Rajas were regarded as a sort of ultimate court of appeal in cases of every description, judicial and other. And while the Emperor was at the apex of power in his own realm, he was entirely independent of any other authority.'[1] Thus according to the Muslim law also, the sovereign was absolute. I do not know what results a detailed examination of other oriental systems to which Sir Henry Maine generally refers might lead to.

Sir Henry Maine's views further considered.

Sir Henry Maine treats the absolutist theory of sovereignty as a mere view of history. He says that the theory is the outcome of the efforts of political philosophers to justify particular phases of history or systems of polity. On the other hand, the progress of human society from a nomadic and familial to a political condition seems to involve necessarily the emergence of the juristic conception of sovereignty. That is why we find such widely different social systems as the Hindu, the Roman and the Teutonic evolving this conception just as they all evolved the conceptions of marriage and

[1] *Our Indian Protectorate*, p. 185.

property. Sovereignty, therefore, is not a view or an inference from the trends of history but a necessary characteristic and factual concomitant of a society which has become political and exists quite independently of the particular environment of such society.

Value of the juristic conception especially when sovereignty has been assumed by the people.

The importance of the recognition of the absolute character of sovereignty and the utilization of its majesty and limitless creative power for the purpose of the collective progress of the people is obvious. On the other hand, if sovereignty is conceived of as divisible, this would provide the best philosophic justification for anarchism. Each citizen may claim to possess a stick of his choice from this bundle of rights all for himself, with the result that society would be disintegrated and atomized. I do think that no theory of political organization which leads to this logical result would be countenanced by those who realize the value, indeed the inevitable necessity, of using the unifying and progressive power of the omnicompetent sovereign to lead society towards its higher destiny. In these days when sovereignty has been assumed by the people itself, acting as an organized whole, ethical justification

for the attribution of this supreme power is not lacking. Those who deny the absolute sovereign have no high purpose to advance by such denial. But the mischief and confusion which result from their ill-considered attempts to pervert history and fact are full of the most dangerous possibilities.

Rulers' claim of sovereignty based on a fundamental misconception as to the nature of sovereignty. This discussion becomes relevant to our inquiry, as it is by reason of the fundamental misconception, that sovereignty is divisible and capable of limitation, that the Indian States themselves claim to be sovereigns. Far from helping them, this adherence to a mistaken theory is the cause of most of their troubles. It is because of this claim that, although they are no more than subjects of the Crown, they do not enjoy the benefit of justice in His Majesty's law courts. An act of State cannot be pleaded against a subject[1] but

[1] 'In order to avoid misconception it is necessary to observe that the doctrine as to acts of State can only apply to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subject there can be no such thing as an act of State.' Sir J. F. Stephen, *A History of the Criminal Law of England*, Vol. II, p. 64. See also *Secretary of State for India v. Kamachee Boyee Saheba*, op. cit. *supra* and *Walker v. Baird*, *L.R.* (*1892*),

although the States are subjects to all intents and purposes, their assertion of formal sovereignty enables the Crown to affirm that its dealings with them are acts of State and thus fall outside the jurisdiction of British municipal tribunals.[1] From this point of view the status of British Provinces is immensely superior to that of the States.

Mr Panikkar's inconsistency. Although Mr Panikkar questions the Austinian theory of sovereignty he does not hesitate to draw upon some of its implications where they suit his purposes, however inconsistent they may be with his main contentions. For example, he invokes the principle that 'No sovereign can invest another person with sovereign powers', which is a true inference of the juristic theory, and suggests that the Crown could neither create nor abolish the number of States in India.[2]

A.C. 491. In *Johnstone v. Pedlar*, *L.R.* (*1921*), *2 A.C. 262*, the House of Lords extended the doctrine holding that a friendly resident alien was in the same position as an ordinary subject and that an act of State cannot be pleaded against him.

[1] See p. 12, *supra*.

[2] At a very early stage in the discussions of the Federal Structure Sub-Committee, Sir Tej Bahadur Sapru laid down the position that 'of the units that contemplate Federation, one, namely the Indian States, has sovereignty, whereas the provinces as they exist at present are not

If, as he maintains elsewhere, sovereignty were divisible, and *ex hypothesi* the part-sovereignty of the Crown over the States was created by surrender of powers by them, here we have a conclusive refutation of the principle that one sovereignty cannot create another. To such obvious contradictions are the critics of Austin driven.

The view advanced by these writers has thus been that it is the Rulers who have created the sovereignty of the Crown by giving it some of their sovereign powers. Apart from the juristic aspect, even as a fact, this contention seems to be incorrect. If the history of the States were examined it would on the contrary show that the Paramount Power not only created several States but increased or reduced

sovereign States. *They may be made sovereign by Acts of Parliament,* but that is a different question altogether'. (Italics mine.) (See p. 13 of the First *Report.*) Later on several speakers referred to this creation of provincial sovereignties by Acts of Parliament. This, of course, is directly opposed to the well-recognized principle that one sovereignty cannot create another, which even Mr Panikkar, the uncompromising critic of Austin, accepts as valid. (See also W. W. Willoughby, *Fundamental Concepts of Public Law,* p. 169.) Note that Sir Tej Bahadur Sapru then conceived of the Federation as consisting of only two units, the States and British India. This view did not find favour with the Committee and has not been adopted in the Act.

their extent or even abolished them at its pleasure.

The Paramount Power creates a State. Mysore which is one of the foremost Indian States is an apt example of such creation. After the battle of Seringapatam in 1799 the question arose as to the future of Mysore. Several alternative proposals were considered by Lord Wellesley. The Governor-General in a letter of 23 May 1799 to the Resident at Poona asserted, 'it is almost superfluous to state to you that the whole kingdom of Mysore, having fallen to the arms of the Company and the Nizam, is at present to be considered as a part of their dominions by right of conquest.' [1] Mysore having thus become part of the sovereignty of the British and the Nizam, its international status under Tippoo was entirely destroyed. Having conquered and laid hold of the country Lord Wellesley considered that the best way of preserving the effects of the conquest would be to entrust the government to the titular Hindu Prince as with the organization then available, the direct administration of Mysore would have involved a vastly

[1] *Mysore State Papers*, Vol. II, p. 43. I am obliged to Sir Mirza Ismail, Dewan of Mysore, for permission to quote from Mysore State Papers.

added responsibility to the East India Company. Part of its territories, however, was retained by the conquerors who divided it between themselves and what remained was granted to the Raja. In the words of Lord Wellesley himself he considered it ' more convenient and less liable to future embarassment to rest the whole settlement upon the basis of our right of conquest and thus to render our cession the source of the Raja's dominion '.[1] This is the real historical origin of the political organization of modern Mysore.

The course of its subsequent history is even more suggestive. Within thirty years of this settlement, the British power re-entered Mysore, set aside its Ruler and administered it directly through its own Commissioner for half a century. Lord Dalhousie, in a Minute of 16 January 1856 referred to the probability of the Raja's early demise without any heir and the fact that the Raja declared he would not adopt a son as he wished to die the last King of Mysore. He then put forward the

[1] *Mysore State Papers*, Vol. II, p. 57. See Articles 20, 21, 22, 23 and 24 of the Instrument of Transfer of 1881 by which the supremacy of the Governor-General-in-Council is fully established as the ultimate authority over Mysore, and the Maharaja is assigned an inferior position. (*Mysore State Papers*, Vol. I, p. 52.)

theory that the treaty with the Raja was a personal one, and that after the Maharaja's death the State could be annexed. He said, 'The treaty under which Lord Wellesley raised the Raja, while yet a child, to the musnud, and the treaty which was subsequently concluded with himself were both silent as to heirs and successors. No mention is made of them; the treaty is exclusively a personal one. The inexpediency of continuing this territory, by an act of gratuitous liberality, to any other native Prince, when the present Raja shall have died, has been already conclusively shown by the conduct of His Highness himself, whose rule, though he commenced it under every advantage, was so scandalously and hopelessly bad, that power has long since been taken from him by the British Government.'[1] All the time the so-called sovereign of the Mysore State was wailing and protesting to the Company, the Governor-General, the Queen and Parliament against the injustice of his supercession and begging them to restore him. As the idea was to put an end to the ruling dynasty of Mysore the Paramount Power even withheld any recognition of the Maharaja's adopted son for three years

[1] *Mysore State Papers*, Vol. III, p. 133.

after the adoption ceremony. The Instrument of Transfer of 1881, which again reads like a grant and not like the recognition of pre-existing sovereignty, alludes merely to the desire of the British Government that the territories should be administered by an Indian dynasty, and does not recite any absolute and indefeasible sovereign right of the Ruler. His allegiance and subordination to the Crown, however, are expressly declared there. The Governor-General's sanction to the alteration of certain domestic laws introduced by the British Commissioner's administration is laid down as a prerequisite to the validity of such alteration, and his power to resume direct administration, in case the standards set by the British are relaxed, is unequivocally asserted. Further the language of Article 21 of the treaty of 1913 is explicit as to the right of the Paramount Power to deal with the affairs of Mysore at its discretion. It runs as follows: 'While disclaiming any desire to interfere with the freedom of the Maharaja of Mysore in the internal administration of his State in matters not expressly provided for herein, the Governor-General-in-Council reserves to himself the power of exercising intervention in case of necessity, by virtue of the general supremacy and paramount

authority vested in him, and also the power of taking such precautionary or remedial action as circumstances may at any time appear to render necessary to provide adequately for the good government of the people of Mysore, or for the security of British rights and interests within that State.' [1] The scope of this article is broad enough to justify any and every intervention by the Governor-General-in-Council. Apparently the stature of this sovereign ward had not grown a whit since the Transfer of 1881.

Mysore, a State created by the Paramount Power. I submit that what follows from these facts is not that the sovereignty of Mysore has all along existed and what the Paramount Power did was merely to recognize it, but that after the conquest of 1799 the Maharaja and his government administer Mysore when they are permitted to administer it as delegates of the Crown, or in the words of Sir John Malcolm as 'royal instruments'.[2] Mysore therefore is properly an instance, as Sir Lewis Tupper says, 'of a State entirely created by British authority.' [3]

[1] *Mysore State Papers*, Vol. I, p. 60.
[2] Quoted in *Our Indian Protectorate*, p. 109.
[3] ibid., page 119. Among other States created or re-created by the British Power may be mentioned Tonk,

The Paramount Power abolishes States. As for the abolition of States many precedents are available. Well known are the cases of annexation of native States during the first sixty years of the nineteenth century. These annexations were not always the results of wars and conquests but were carried out during peaceful times when the State had given absolutely no provocation. Lord Kingsdown in delivering judgement in the Tanjore Case, which is typical of annexations, said, 'It is extremely difficult to discover in these papers any ground of legal right on the part of the East India Company or of the Crown of Great Britain to the possession of this Raj or of any property of the Raja on his death; and indeed the seizure was denounced by the Attorney-General as a most violent and unjustifiable measure.'[1] It is true that annexation as a policy has now been practically abandoned.[2]

Rajpipla, Jhalawar, Garhwal, Benares and Kolhapur. It is well known that Sir Leslie Scott as counsel for the Chamber of Princes in his address to the Butler Committee frequently referred to Mysore as a State created by the British Power in 1799 and recreated again in 1881.

[1] *Secretary of State for India v. Kamachee Boyee Saheba, supra.*

[2] 'We desire no extension of our present territorial possessions', Queen Victoria's Proclamation, 1 November 1858. (See Mukherji, op. cit., p. 432.) The sanads of 1862 declared that Her Majesty was 'desirous that the

The reason is not because the Paramount Power has no power to effect annexations any more, but because it is not in its interests to do so. Sir Lewis Tupper says, ' Briefly we now believe that it is in the interests of the British Government to maintain the principalities, and that if we were to get rid of them, we should be injuring ourselves.' [1]

Paramount Power increases and decreases the extent of States. Not only does the Paramount Power create or abolish States but in practice it also extends or limits their territories. One case of cession of British territory in times of peace to the administrative control of an Indian State is referred to in Damodar Goverdan's case.[2] The converse case of abridging the territorial limits of a State is furnished by the Berars. The contention of Hyderabad all along has been that she is rightfully entitled to the restoration of the Berars, but the Paramount Power has disallowed the claim and virtually annexed the Berars. The fact that certain concessions have been made to the *amour*

governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated '.

[1] *Our Indian Protectorate*, p. 89.

[2] *L.R. 3, Indian Appeals*, p. 102.

propre of the Nizam by preserving his nominal sovereignty over the territories of the Berars is devoid of any significance. His sovereignty over the Berars is no more real than that claimed by the monarch of England over France at one time.[1]

Nature of other marks of sovereignty. The use of the expression 'Sovereign' in connexion with the States and their Rulers, their enjoyment of many of the usual regalia associated with the heads of Independent States and the

[1] As regards the right exercised by the Crown to create, abolish or otherwise deal with State territory, see the Opinion of Counsel for the Princes on p. 62 of the Butler Committee *Report*. An interesting instance of abridgement of territory is furnished by the Baud State. The case of the State is that, without any reference to the Ruler of Baud, the British Government transferred Panchara Pargana to the Sonepur State and informally annexed Khondmals to itself. Thirdly, it detached Athmalik, which was part of Baud, from the State and recognized its Chief as being independent of Baud, and this Chief entered into separate engagements with the Paramount Power. Thus large slices of territory were taken away from Baud altogether disregarding the Ruler. The Ruler's memorials to the Paramount Power, supported by the opinion of eminent lawyers and unimpeachable evidence, were rejected without any reasons whatever being assigned. This case is a luminous illustration of paramountcy in practice.

It is also noteworthy that § 147 (5) (*b*) of the Government of India Act of 1935 refers to the 'creation or restoration of a State' and to a 'grant or increase of territory' of a State.

fact that they are treated as foreign sovereigns by British municipal courts cannot of themselves confer the status of sovereignty upon them irrespective of the actual situation. They are rather in the nature of personal titles, decorations and privileges, in most cases surviving from better days when they meant something real. From the point of view of the Crown many useful purposes are served, by preserving the form of sovereignty in these ways, in the shaping of the political policies of India. An analysis however shows that the sovereignty of the States is at its best nothing more than formal. Similarly, it is not right to give the usual international law significance to the treaties between the States and the Paramount Power. A treaty is defined as 'a compact made between two or more independent nations with a view to the public welfare'.[1] In this sense the instruments

[1] Bouvier's *Law Dictionary*, Vol. III, 8th ed., p. 3312. It is noteworthy that while treaties may be denounced under appropriate circumstances, it is not claimed for the States that they have any such right. The State enters into a relationship with the British Government for ever and cannot alter it, though the latter unilaterally alters it continually. A treaty of perpetual obligation is unknown to law. 'No independent Government can indefinitely and for all time bind its successors by treaty, for a community so shackled would no longer be completely independent. It should follow therefore that every State becomes legally entitled to repudiate a treaty of indefinite

to which the Paramount Power and the Rulers are parties are not treaties and yet, as in the case of sovereignty, the expression continues to be used however inappropriate it may be. A political status which has to be deduced from interpretations of formal expressions and not from actual facts rests on very slender foundations indeed.

True position of States. If then the Rulers are not sovereigns, what is their true position? Prof. J. Westlake described them to be in constitutional relation with the British Crown. He thought that just as New South Wales and British India are separate parts of the British Empire, so also the Indian States formed another distinct part of the same Empire under the sovereignty of the Crown. That the sovereignty of the Crown exists as a fact cannot be disputed and consequently the States are subject

obligation as soon as the conditions which preceded its formation have undergone substantial modifications.'—Lord Birkenhead, *International Law*, 6th ed., p. 144. It cannot be denied that there has been substantial modification during the past 100 or 125 years in the position of the Indian States which would justify the Paramount Power repudiating them applying the doctrine of *rebus sic stantibus*. And, as a matter of fact, under the prevailing conception of paramountcy, the treaties are as good as repudiated. But neither party would frankly acknowledge this patent fact.

to the constitutional authority of the Crown.[1] The difference between British India and the Indian States lies in the manner in which the Crown's sovereignty is exercised. As regards British India, the authority is exercised through several constitutional channels and subject to law. But in the Indian States, however, that authority is exerted by executive processes which in large part operate in concealment and outside the purview of the ordinary law. The real anomaly in the position of the States lies in this, that these subjects of the Crown are not under the protection of the law. The application of the doctrine of acts of State deprives them of the assistance of courts which is of such enormous importance to a citizen of a civilized country. Thus do the Indian States fall between the two stools of paramountcy and sovereignty.

It may be asked why if the position were so clear it has not been authoritatively recognized. This raises questions of politics to which this is not the occasion to advert. The Indian States Committee made one significant remark which I may recall in this connexion. It said,

[1] The Butler Committee finds that the States are 'governed by rules which form a very special part of the constitutional law of the Empire'. See *Report*, para. 43.

'Through paramountcy is pushed aside the danger of destruction or annexation' of States.[1] The meaning implied in this observation seems to be clear enough. The Paramount Power ensures the continued existence of the fictitious sovereignty of the Rulers and prevents natural forces from asserting themselves in the formation of a unified and democratic all-India polity. But if the Rulers start ugly arguments about their so-called rights, they may have to face the prospect of annexation or, in the alternative, deal with the growing menace of the abolitionists of British as well as 'Indian' India unaided by the Paramount Power. That warning seems to be implicit in the suggestion veiled in this observation. In other words, unless the theory of the absolute supremacy of the Paramount Power is accepted in the unlimited manner in which it is laid down in its *Report,* the Committee warns States that the result may be their destruction by revolutionary forces or annexation by the Paramount Power.

British Policy is to perpetuate the States.

But, so far as the Paramount Power is concerned, the annexation of the States is a policy which after trial was abandoned as generally inconvenient.

[1] Butler Committee *Report,* para. 57. See p. 17, *supra.*

From the early years of the nineteenth century, the minds of British administrators and statesmen had been applied to the question whether it would not be better to do away with the Indian States altogether. It was felt that, with the meagreness of European fighting forces then available in India and the then existing strength of the British Navy, it would be too serious a responsibility to hold all India in direct rule. Besides, the aggressive annexation policy of Lord Dalhousie was in a large measure responsible for the outbreak of the mutiny which gave a rude shock to the British Empire in India. Lord Canning had to consider the whole question in his celebrated dispatch of 30 April 1860, in which he recommended that annexation should be given up and that the States should be guaranteed perpetual life. He observed, 'It was long ago said by Sir John Malcolm that if we made all India into zillahs' (or British districts) 'it was not in the nature of things that our Empire should last fifty years; but that if we could keep up a number of native States without political power, but as *royal instruments* we should exist in India as long as our naval superiority in Europe was maintained. Of the substantial truth of this opinion, I have no doubt; and recent events

have made it more deserving of our attention than ever.' [1]

Wisdom of the policy. The wisdom of his policy is admitted on all hands. Lord Canning drew attention to the fact that when the whole of Hindustan was in rebellion most of the native Rulers stood loyally by the British and helped to quell the insurgents. They proved by their steadfastness on that supreme occasion their value to the Empire and their title to the gratitude of the Paramount Power. The Rulers have since remained an immense source of strength to the British Raj. They have ruled their principalities as faithful royal instruments and have saved the Crown much of the trouble and the embarassment of organizing their direct administration. And as the radical elements in British India begin to assert themselves, the Rulers whose interests and upbringing are necessarily conservative, are proving once again how wise it was of British statesmanship to have saved their order from the total annihilation with which the early Empire builders threatened them. The kind of Federation set up by the Government of India Act of 1935 is the great fruit of this policy.

[1] Quoted in *Our Indian Protectorate*, p. 109. (Italics mine.)

LECTURE II

THE BACKGROUND OF THE FEDERAL CONSTITUTION

British policy in India. Before studying the nature of the federal constitution established by the Government of India Act of 1935, it may be useful to review briefly the evolution of British policy towards British India and the Indian States. When the East India Company became a political power its first temptation was to treat its acquisitiou's merely as profit-yielding property. But British statesmen perceived the possibilities of establishing an Empire in India and from the earliest times their object was to provide for institutions necessary for a system of settled government. Administrative organization of the country went on side by side with fresh territorial acquisitions until at last, when the strength and durability of British power became assured, it was possible for the government to devote itself with greater concentration to the work of internal development. In the first stages all positions of responsibility and power in the administration

were exclusively filled by the British. Western education was introduced with the deliberate object of giving the people of this country the benefit of British culture and traditions. When after a time there were sufficient numbers of trained Indians available, they were gradually appointed to the services to fill more and more important offices. Leading Indians were nominated to the Legislative Councils for the purpose of giving the benefit of their advice regarding the needs of the Indian people. The next step was to sow the seeds of democracy by creating institutions of local self-government. The results of this initial experiment justified the extension of the representative principle to the Legislative Councils also. Constitutional progress lay thereafter in the direction of increasing the number of popularly elected representatives in the legislatures, until the stage has been reached when there is a majority of such representatives in the popular Houses of the Legislature. The basis of Representative Government has also been slowly broadened by increasing the numbers of the electorate. Thus with the spread of education not only were Indians actively associated in the administrative services, but popularly elected representatives had an increasing but not

yet decisive part in the work of legislation. The success of these experiments has been acknowledged by many competent and impartial observers.

As political consciousness spread among the people, as a result of settled conditions and growing unity in the country, their natural desire for self-government also began to find expression. The emergence of the national movement gave shape to the political aspirations of the people and even before the Great War, Indian publicists had formed dominion self-government as their objective. The War, as is well known, liberated the spirit of democracy and nationalism all over the world, and India was no exception. By her selfless sacrifices in men and money she had established a claim upon the gratitude of England during the greatest crisis that the Empire had yet faced. In consideration of these facts Parliament formally recognized the goal of India's political progress to be responsible self-government, to be achieved by stages as India showed her increasing fitness for advance. The Montagu-Chelmsford Reforms which established a form of government in the provinces, introducing the principle of partial responsibility, was the first step in this process. Indian opinion was

totally dissatisfied with this inadequate and very complicated type of responsible government, and the efforts that Indian Nationalists have since been making to obtain fuller freedom is recent history.

The general trend of British policy towards the directly administered areas of India is thus the gradual transference of the responsibility for the government of India from Parliament to the legislatures of India. From what was an absolute government, a benevolent autocracy, the institutions have been liberalized first to respond, and to be responsible, to the people of India. The power of Parliament is being slowly relaxed until, when the promise of Dominion Status is fulfilled, it would cease to be even nominal.

Policy towards the States. A contrary course has been pursued with reference to the Indian States. Originally the more important of them were independent and equal allies of the British power. As time went on they slowly lost one right after another, either under treaties which were dictated to them, or by the application of the doctrine of paramountcy in its various forms. These originally independent sovereign States first lost altogether their international life. They could not make peace or war or

negotiate or communicate with foreign States or with each other. They were all substantially deprived of their right of maintaining their own fighting forces except for ceremonial purposes. As regards their internal affairs the original intention of parties appears to have been that the benefit of British arms should be available to a Ruler to put down his enemies within and outside his State. As interpreted by the Paramount Power this duty was turned in course of time into a right of intervention in the internal affairs of the State. What was at first a duty owed to the Ruler of a State was expanded into a right exercised for the benefit of a State or its citizens or of India as a whole, at the discretion of the Paramount Power.[1]

[1] See Butler Committee *Report*, paras. 52–55. 'The guarantee to a native Ruler against the risk of being dethroned by insurrection necessarily involves a corresponding guarantee to his subjects against intolerable misgovernment. The degree of misgovernment which should be tolerated, and the consequences which should follow from transgression of that degree, are political questions to be determined with reference to the circumstances of each case.' Sir C. P. Ilbert, op. cit., p. 167. Sir Charles Metcalfe, the eminent Indian administrator, was a determined opponent of this policy of intervention and said, 'The evil created by interference is generally irremediable. It virtually if not ostensibly destroys the State to which it is applied and leaves it only a nominal, if any, existence.'

Acting upon these broad considerations the Paramount Power found not a few occasions for intervening in the affairs of Indian States. The doctrine was extended so far that by the exercise of what is called the prerogative of the Crown, whose origin in British constitutional law in relation to these matters is not easy to discover, the Crown claimed and exercised the right to recognize successions of Rulers, to formally invest them with ruling powers and to settle disputed successions upon such principles as it thought fit. Regardless of local usages in the States, the Crown assumed control of minority administrations. The Crown also deposed Rulers after such inquiry as is provided for in the Government of India Resolution of 29 October 1920, as a punishment for misrule, misconduct, unfitness or other cause, administering the State through its own officers for varying periods of time. Further, under its obligations to the people of the State, as Paramount Power or for any other reason, good and sufficient in its opinion, the Crown exercises control over the internal affairs of the States as minutely as may appear necessary to it. In practice no limit is observed to the extent of interference by the Paramount Power in the internal affairs of a

State.[1] There is no warrant in the so-called contracts between a State and the Paramount Power for many of these rights. Still they are exercised as a matter of course.

Finally, the Paramount Power has assumed the right of intervention in the Indian States on grounds of all-India benefit. The importance of this right cannot be exaggerated. The Indian States Committee explains that most of the matters covered by this formula of all-India benefit are economic in character.[2] This places the economic life of the States fully under the control of the Paramount Power; and not a few States have complained that the Paramount Power has not shown that regard for their interests which they were entitled to expect under the protection of the Crown.[3]

[1] Several instances of such interference have been collected in the four volumes of evidence submitted by Sir Leslie Scott to the Butler Committee in the course of his argument. Mr Panikkar says, 'Those who desire to acquaint themselves with the Public law of India will find in them all the available material collected, arranged and analysed in the most efficient manner.' (*Inter-Statal Law*, p. ii.) As a matter of fact the material relates not to the so-called law but to only to alleged violations of it by the Paramount Power, violations which affect the State at all points from the most important to the least.

[2] Butler Committee *Report*, para. 55.

[3] H.H. the Nawab of Bhopal said: 'We have been in some sort the stepchildren of the Government of India;

Thus, whether dealing with the Ruler or with the State, British policy has been to limit and circumscribe their authority more and more. This was referred to recently by the Rulers themselves in their Note enclosed in the letter to the Viceroy on the provisions of the Government of India Bill. They said, ' The documents of 1818, by which several States parted with their external and foreign relations in consideration of their being adequately protected from both foreign aggression and internal upheaval, were regarded as treaties of mutual friendship, amity and alliance. The proposed documents of 1935, by which the States are asked further to transfer some of their internal sovereignty as well to His Majesty the King as a result of proposals regarding Federation discussed between representatives of His Majesty's Government of British India and of the " Rulers of Indian States under the suzerainty of His Majesty ", are only to be treaties of Accession. The Princes are asked to execute and sign these Instruments of Accession without regard to

we have been isolated from the tide of progress ; we have been barred in backwaters away from the main stream of economic and political development.' (See *Report* of the Proceedings of the First Round Table Conference, p. 239.)

the derogation of their position from allies and absolute Rulers in their own territories to Rulers under the suzerainty of the other party to the alliance. This undermining process is to be kept up and strengthened under the force of judge-made laws and new political theories while reinforcing the claims of paramountcy by the same device. It is very natural that the Princes should have serious objections to this process of gradual decline in their political status.'[1] The Rulers further complained against the 'continuous erosive action of usage'[2] and asked that their rights should be determined clearly. It was these observations which elicited the rebuke of the Secretary of State to which I called attention in my last lecture.[3] The result of the expansion of paramountcy has been to curtail their rights and reduce them to the position of mere permissive holders of administrative power, of 'royal instruments'.

Government of India Act of 1935 the meeting point of two different policies. Thus the growth of British policy as regards British India and as regards the Indian States has gone along opposite lines. In the one case it

[1] Princes White Paper, p. 20.
[2] ibid., p. 18.
[3] *supra*, p. 19.

has been a process of levelling up from naked autocracy to acknowledged self-government. In the other case it has been the gradual attenuation of independence to practical subjection. The Government of India Act of 1935 may be said to be the meeting point of these two policies. It brings the two Indias together under a common constitutional system and provides the basis for the determination of the relations between any part of India and the British Parliament upon a statutory footing with the definite objective of progress towards responsible government.

A federal constitution for India favoured by various interests. The Act is the result of many forces in the public life of India. The people of British India were aspiring for full self-government. In devising the mechanism of that self-government their leaders turned to federal models as most suitable. The immensity of the extent of the country, its diverse population differing in language, religion and culture, seemed to present conditions to which a unitary constitution would be wholly inappropriate. Apart from these reasons, the great Muslim minority of India had come to look upon a federal constitution as an important safeguard of its interests. There were also a

few Indian publicists who supported the federal plan because they thought it would help the eventual assimilation of States in an all-India polity.

States' support for a federal constitution. On the part of the States there was an equally irresistable tendency in favour of federalism. When the Paramount Power went on spreading its authority the States felt helpless in their isolation. They could not discuss their grievances with each other and make common cause nor could they consider and undertake welfare schemes in co-operation. They had no means of discussing with British Indian Legislatures those matters in which the decisions of the latter had serious economic consequence for the States.

Tendencies towards Federation. From the seventies and eighties of the last century there have been many proposals for establishing a machinery for common consultation among the Rulers. The Montagu-Chelmsford *Report* refers to the efforts made in this direction by successive Viceroys from Lord Lytton to Lord Chelmsford.[1] None of these, however, took permanent shape and the leading Rulers like the Maharajas of

[1] Montagu-Chelmsford *Report*, para. 301.

Baroda and Bikaner were already thinking of a federal solution of the problem. It is at this stage that the Montagu-Chelmsford *Report* recommended the establishment of a permanent Chamber of Princes with the Viceroy as President for the purpose of affording a platform for the discussion of problems of common interest among the Rulers. The constitution of this Chamber, which is planned on the principle of equality of States big and small, has not been acceptable to the larger States, several of whom have kept out of it. The history of the Chamber during the last fifteen years reveals not only the existence of many grievances of Rulers against the Paramount Power and British India but also the absence of any real spirit of co-operation among the Rulers themselves. While some of the larger States have stayed away altogether, those which participated in its work were unable to combine under a common leadership and were animated by a spirit of faction which has considerably weakened the prestige and usefulness of the Chamber. But discussions even in such a Chamber showed how the position of the Rulers needed definition and improvement and how unless there was some method of deciding common problems upon an all-India, instead of upon a British India,

basis there was bound to be much injustice to the States. The Governor-General-in-Council as the representative of the Paramount Power and as the Chief Executive of India, is expected to reconcile the interests of British India and the States in matters of common interest. When British India becomes a responsible government and the functions of paramountcy are dissociated from its executive, the Governor-General-in-Council will no longer be able to effect this reconciliation.

Views of the Indian States Committee and the Indian Statutory Commission. The Indian States Committee adverted to this problem and while it was impressed with the need for closer union between British India and the Indian States, it urged caution in dealing with any question of Federation as at that time 'so passionately were the Princes as a whole attached to the maintenance, in its entirety and unimpaired, of their individual sovereignty within their States'.[1] Similarly, the Indian Statutory Commission also referred to this problem of Federation in these words: 'We are, therefore, following what has become a generally accepted view, when we express our own belief

[1] Butler Committee *Report*, para. 78.

that the essential unity of Greater India will one day be expressed in some form of federal association, but that the evolution will be slow and cannot be pressed.' Nevertheless, as a 'short step on the long journey' to Federation, the Commission recommended the establishment of the Council for Greater India consisting of representatives of the Indian States and British India, with the Viceroy as President, with powers to discuss and record decisions on matters of common concern, of which a tentative list was drawn up, and the Viceroy empowered to add to the same from time to time. The views and decisions of the Council would be embodied in Reports which would be placed before the Chamber of Princes and the Central Legislature of India. The Council would have wide powers of investigating facts bearing upon the common life of the two Indias. 'The whole scheme for the council' says the *Report* of the Commission 'is designed to make a beginning in the process which may one day lead to Indian Federation. What we are proposing is merely a throwing across the gap of the first strands which may in time mark the line of a solid and enduring bridge, and we feel convinced that the process must begin in organized consultation between the States

and British India, both because such consultation is urgently needed in the interests of both and because it will assuredly foster the sense of need for further developments and bring more nearly within the range of realization other steps which are as yet too distant and too dim to be entered upon and described.'[1]

Conditions in India and the attitude of Rulers.

And yet, within a few months of this expression of doubts and difficulties, the Round Table Conference was actually discussing the details of a plan for Federation. Public opinion in India was hostile to the Indian Statutory Commission and rejected its proposals. The Labour Party which came into power in England recognized the strength of the dissatisfaction in India and decided to call a conference of all the parties concerned to arrive at a solution by agreement. It looked as though Indian nationalism would triumph and self-government would be an accomplished fact within a short time. In this situation, the Rulers felt that unless they had their position defined, they would have to face much uncertainty and risk in the future. Democratic feeling had grown to great dimensions and had overflowed

[1] *Report* of the Indian Statutory Commission, Vol. II, 1929, p. 206.

into their domains. States' peoples had started agitations for constitutional reforms and everywhere there was awakening. The Rulers were afraid that unless they secured the alliance of the British Indian democracy also, their position in India would be unstable. Therefore they wished to make their terms both with the Paramount Power and with British India.

Views of parliamentary statesmen. So far as the parliamentary statesmen were concerned the association of the Rulers in a scheme of federalism seemed to offer the best solution to the difficulties that they had in relaxing control over British Indian affairs. A considerable section of Englishmen was opposed to the extension of Institutions of parliamentary democracy in India. Except a few radical politicians, mostly of the Labour Party, public opinion in England was anxious to provide for a scheme of safeguards which would keep the constitution from being swayed by extremist influences. To all these the inclusion of Princes or their representatives in the Federal Legislature suggested the best guarantee of stability and conservatism in the new constitution. Besides, the agents of paramountcy would also be able to influence the federal machinery in many ways, particularly through the minority

administrations of the States. And finally, if the States were joined to the system, democratic forces in British India would be restrained and the pace of constitutional progress regulated to a lower speed.

The Round Table Conference. These appear to have been the considerations in the minds of the several parties at the time of the meeting of the First Round Table Conference where the foundations of the present Government of India Act were laid. The measure in which these several interests are satisfactorily adjusted in law and fact is the measure of the success of this statute. The Conference was opened by His Majesty the King in person and was presided over by the Prime Minister. It had all the appearance of a great international gathering and its impressive setting filled the members of the Conference with buoyancy and hope. In the first flush of their enthusiasm, the members, both Indian and European, were in a great mood to accommodate their differences and achieve success, but when they went into the details of the various problems they had to deal with, differences of opinion and interest began to manifest themselves. The Second Round Table Conference consisted of a larger number of members and the difficulties of agreement

were consequently greater also. To the third and final session of the Conference membership was very considerably restricted and its decisions, if any, had even less claim than those of the previous sessions to be considered the result of agreement. In fact, throughout the Conference no decisions were taken as such, the several points being merely noted in the proceedings.

An all-India constitution favoured. In the discussions of the various sessions of the Conference and in the inquiries which were held in connexion with its work are to be found the origins of many of the peculiar provisions of the Act of 1935. Sir Tej Bahadur Sapru, in the first important speech of the Conference, surveying the problems of Indian constitutional progress, made an appeal to the Rulers to join an all-India Federation. He said, ' I think the Indian Princes are every inch as patriotic as any one of us and I make an earnest appeal to them not to confine their vision merely to what is called " one-third India ". I ask them to say whether at any time in history India was so arbitrarily divided as it is now geographically—British India and Indian India. I say we are one India. Let them move forward with the vision of an India which will be one single whole, each part of

which may be autonomous and may enjoy absolute independence within its own borders regulated by proper relations with the rest. I therefore ask them to come forth on this occasion and say whether they are prepared to join an all-India Federation.' [1] Responding to this invitation the Maharaja of Bikaner declared, 'We of the Indian States are willing to take part in, and make our contribution to, the greater prosperity and contentment of India as a whole. I am convinced that we can best make that contribution through a federal system of government composed of the States and British India', and His Highness expressed the readiness of the Rulers to examine proposals for a federal constitution comprehending the States and the provinces of British India.[2] The matter was referred to a committee of the Conference which took up the details and submitted reports on the various aspects of the new constitution as a result of its discussions.

Discussions reveal the importance of the problem of sovereignty. At the very outset the Federal Structure Sub-Committee had to deal with the question of how to combine States which were

[1] *Report* of the Proceedings of the First Round Table Conference, p. 28.

[2] ibid., p. 36.

insisting upon their sovereignty with British Indian Provinces which were subject to the authority of Parliament. The Maharaja of Bikaner asserted, 'That the Princes could not agree to their becoming, or even to their subjects becoming, British subjects by anything arising or resulting from Federation or from their willingness to make any sacrifices now.' [1] Sir Tej Bahadur Sapru admitted that the Indian States had sovereignty and as they wished to stick to it, the constitution could only be a sort of incomplete Federation.[2] All that he wanted was that the States should come into both houses of the Federal Legislature and that they should agree to be bound by the laws of that legislature so far as the federal subjects were concerned. Mr Srinivasa Sastri was alarmed that the result of this line of thought might be to make the Federation a very loose and thin one confined to a very small number of subjects. Mr Jinnah used the argument of the Rulers for claiming sovereignty for the provinces equally with the States under the federal constitution. Mr Jayaker who followed,

[1] *Report* of the Proceedings of the First Federal Structure Sub-Committee of the Round Table Conference, (Indian ed.), 1 December 1930, p. 11.

[2] ibid., p. 13.

thought that to give such sovereignty to the provinces would be unwise. In the discussions that ensued this question of sovereignty came up again and again, the Rulers objecting to this or that proposal because it would constitute an infringement of their sovereignty. Lord Sankey saw that the members of the Committee needed to be reminded about the essentials of a federal government and proceeded to read an extract from the eleventh edition of the *Encyclopædia Brittannica*.[1]

The Lord Chancellor's definition of federalism discussed. It is unfortunate that the Lord Chancellor did not quote from a more accurate and authoritative exposition of the legal and constitutional aspects of federalism than this article in a book of general reference. It is an erroneous exposition and was perhaps the cause of the misapprehensions regarding the subject which one notices throughout the proceedings. In the first place, it refers to the powers and functions of the supreme Federal Government as delegated to it by the States. This obviously is inaccurate language. Delegation implies agency, and it is well understood that the powers of a Federal Government are

[1] ibid., pp. 51-52. See Appendix I, p. 149 *infra*.

not derived by delegation by the States nor exercised in virtue of any agency but because they are granted by the constitution. The more usual way of describing the process is to say that the component States had as a condition of entering the Federation *surrendered* their powers to the nation which by the constitution invests certain powers in the central and others in State Governments. Next the passage goes on to say what was particularly stressed by the Lord Chancellor as going to the heart of the matter, that 'so far as concerns the residue of powers unallotted to the central or federal authority, the separate States retain unimpaired their individual sovereignty and the citizens of a Federation consequently owe a double allegiance—one to the State and one to the Federal Government'.[1] Finally the Lord Chancellor added that allegiance to the Federal Government referred to, means 'to the Federal Government in respect of those matters which are federalized'.[2]

This statement of the nature of a federal constitution and the Lord Chancellor's commentary on it are quite opposed to the accepted juristic view of the federal relation. It says

[1] ibid. [2] ibid.

that as regards the residual powers the States retain their individual sovereignty unimpaired. It is well known that in every federal system provision has been made for constitutional amendment by which powers may be shifted from national to State governments or vice versa. The reference to the individual sovereignty of States in a system of Federation is even more clearly inaccurate. And lastly, it is difficult to understand what the Lord Chancellor means when he mentions in this context a double allegiance and allegiance with respect to certain matters.

The position of a constituent State in a Federation. The position of a State which is a component part of a Federation has been the subject of study among political scientists and jurists ever since the inception of the United States of America. Two views were held regarding this matter. Those who favoured the preservation of the separate identity of the States and the restriction of national government to a minimum field claimed that the federal relation was merely a division of sovereignty. The other view was that sovereignty did not belong to the States or to the national government both of which were creatures of the constitution but belonged to the nation as a whole,

which had control over the constitution, irrespective of its territorial divisions. It was argued that if the central organization was merely a delegate with defined powers entrusted to it by the States, the relation was not a Federation but a confederation of States. Article 2 of the Articles of Confederation was as follows: 'Each State retains its sovereignty, freedom and independence and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled.'[1] While this Article refers to sovereignty, independence and express delegation, these significant words are absent from the federal constitution. The doctrine of States' rights led to the Civil War after which, in the well-known case of *Texas v. White*,[2] it was also judicially repelled. It is now accepted that the essential character of a Federation as distinct from a mere confederacy consists in the fact that while the former is one State with one sovereignty, the latter is a collection of sovereign States. Prof. W. W. Willoughby, the eminent American constitutional jurist, sets out the law as follows: 'Sovereignty, as that term is employed in constitutional law, implies

[1] A. P. Newton, *Federal and Unified Constitutions*, p. 71.
[2] *7 Wallace, 700.*

supreme law-making power; this power is, of logical necessity, an indivisible unity and therefore, in the case of a State apparently composed of a number of united or co-operating States, but two alternatives are possible; either the individual States remain severally sovereign with the result that there is no real central State but only a government that acts as the common agent of the severally sovereign States, or that there is a single sovereign national State, legally omnicompetent, and a number of subordinate political bodies, which may or may not be termed States, but which, juristically viewed, act as agents of the sovereign national State, and possess such political status as they have only within, and as members of, this national body. In the first case, the union is spoken of as a confederacy, or, to use the German term, a *Staatenbund*: in the second case, the union is described as a Federal State or *Bundesstaat*. In the confederacy, the articles of union, whether denominated a constitution or not, are in their essential juristic character, an agreement, compact, or treaty between the severally sovereign States. In the federal State, the fundamental instrument of government is a veritable law embodying the will of the national government or of

its citizens and operating as the source whence, in the last resort, the legal authority or competency of all government agencies or organs, whether national or of the individual States, is derived and determined . . . The division of governmental powers, or rather, of the right to exercise them between the national and State governments has, since the time when the United States Constitution was adopted been spoken of as a " division of sovereignty ". From what has been said, it is clear that this is, and has always been, a *juristically improper and politically unfortunate* description.' [1] Thus the statement read by the Lord Chancellor is not true at least of American federalism, and it is difficult to see to what other system it can have reference.

If the Lord Chancellor had at this stage explained the real position with reference to this distinction between a federal and a confederal relation from the point of view of sovereignty, the consequence may have been to frighten the Rulers away from the Conference. But that risk should have been faced in view of the fact that infinitely greater harm has been done by leaving the matter in this uncertain

[1] W. W. Willoughby, *Constitutional Law of the United States*, Vol. I, 2nd ed., p. 129. (Italics mine.)

and misleading state. The Act as it has now emerged fully bears out Prof. Willoughby's view of the federal relation. And yet, many of the Rulers are even now under the impression that their sovereignty has been preserved.

Allegiance. The Lord Chancellor next refers to a double allegiance and allegiance in respect of certain specified matters. Allegiance is a technical term of feudal origin which is now used to describe the duty of assistance, fidelity and obedience which a subject owes to his sovereign. The expression double allegiance is sometimes used with reference to the obligations of resident aliens. But this is perhaps the first occasion when an authority of the eminence of the Lord Chancellor of England applies the expression so as to mean that within the same State a subject owes or can owe more than one allegiance. Even more surprising is the Lord Chancellor's approval of the strange doctrine that allegiance can be limited to particular matters. His Lordship cited neither authority nor precedent for it. Allegiance is a general duty whose implications have to be gathered from situations as they arise. It is not a compendious term to describe a specific set of duties. Just as the scope of sovereignty itself cannot be limited,

allegiance which is its correlative is equally incapable of limitation.[1]

This description of federalism, however faulty, was convenient. It allayed the apprehensions of the Rulers about the danger to their sovereignty. It assured to them that the allegiance of their subjects to themselves continued unchanged. And finally, it confirmed their desire that the constitution should be a rigid one with their position in it unalterably strong.

Later official views as to the nature of the federal constitution. Between this elucidation of federalism and Sir Samuel Hoare's exposition of it to the Rulers four years later, there is considerable difference. Replying to the objections raised by the Rulers to Clause 6 of the Government of India Bill and their contention that they should not be bound by the provisions of the Act except those to which they have expressly agreed, the Secretary of State drew attention to the essentials of federalism. He said, 'A Federation is the union of a number of political communities for certain common purposes; and every such union necessarily involves that some of the powers of each fede-

[1] And yet these remarkable doctrines of the Lord Chancellor are implied in the forms of oaths prescribed in Schedule IV of the Government of India Act of 1935.

rating community shall with its assent thereafter be exercised by a central authority or authorities on behalf of all. It is this organic connexion between the federal units themselves, and between each of them and the central authority, which distinguishes a Federation from a mere alliance or confederacy. His Majesty's Government have never contemplated a Federation of India only as an association in which British India on the one hand and the Indian States on the other would do no more than act in concert on matters of common concern. From an early stage discussions have centred on the creation of an organic union between the two, with a Federal Government and Legislature exercising on behalf of both, the powers vested in them for the purpose.'[1] He carefully avoids any reference to the sovereignty of the States and refers to them merely as 'neither British territory nor subject to the authority of Parliament'.[2] The whole argument of this memorandum is, that by acceding to the Federation an organic or, in other words, a constitutional fusion occurs of the States and British India. A State cannot, with reference to Parliament, bear both a constitutional and an

[1] Princes White Paper, p. 30. [2] ibid.

extra-constitutional relation at the same time, and yet this would be the result if the conception of State sovereignty indicated by Lord Sankey and taken up with avidity by the spokesman of the Rulers is correct.

Throughout the debates of the Federal Structure Sub-Committee the confusion created by this mixture of conflicting motives runs. The British Indian delegates were thinking of a federal union and laid stress on those features which are appropriate to such a union. The Rulers on the other hand, emphasized their sovereign character and the need to give expression to it in every possible way in an all-India constitutional scheme. It may be useful to study some of the contentions raised by the Rulers from which it would be apparent that their acceptance of the federal ideal was neither full nor hearty.

Rulers stress their sovereignty. In the very first debate at the Committee on the important question of the classification of subjects into federal and non-federal, these vital differences between the Rulers and the advocates of federalism began to appear. When, for instance, it was suggested that Posts and Telegraphs should be made federal, Sir Akbar Hydari came out with the emphatic assertion that so far as

Hyderabad was concerned it was impossible to agree to this proposal. He referred to the Post Office and postal stamp as insignia of sovereignty and said, 'This is a matter of having our own post offices and postal stamp which I, as the representative of Hyderabad, will not be able to agree upon, not on any ground which is ponderable, but on a matter which is considered to be an essential element of sovereignty and dignity.'[1] Sir Bhupendra Nath Mitra pointed out that if the States were permitted to have their own postal arrangements, it would give rise to so many systems within India as to cause practical confusion and financial loss and thus defeat one of the first objects of Federation. Other members also expressed their opinion that this was a typically proper subject for federalization and quoted the experience of many countries. But Hyderabad was adamant for the sole reason that the surrender of postal rights to the Federal Government would be the surrender of a much valued insignia of sovereignty.

Claims of the Rulers on the score of sovereignty. The same considerations induced the Rulers to claim exemptions in respect of such subjects

[1] *Report* of the Proceedings of the First Federal Structure Sub-Committee, p. 58.

as customs, ports, currency and coinage and railways. One Ruler or another got up and said that the particular subject was one he could not hand over to the Federation either because he considered it an attribute of sovereignty or because it was a financial asset, the benefit of which he was unwilling to forego. The Rulers looked upon the transaction as a pure business deal rather than as promoting a supreme national purpose in the pursuit of which considerations of personal prestige and slight monetary loss should not weigh too much.

Apart from demands for the exemption of individual States from federal jurisdiction in matters of common interest which could not but be federalized, there was a class of subjects which it would be to the advantage of the country as a whole to be made federal. The British Indian Provinces particularly wished to retain the advantages of the uniformity of laws effected by the great Codes of the Indian Legislature. There were also subjects, like labour welfare research and statistics, which would gain by being treated as all-India subjects. The Rulers did not agree to the inclusion of these matters in the federal list applying to them. Here again their contention was that not all-India benefit but compelling all-India

necessity should determine the classification of subjects.

Applicability of federal laws. Even more characteristic of their general attitude towards Federation was the contention of the Rulers that federal laws should not apply in the States *proprio vigore* but should have operation only after they were re-issued by the respective Rulers under their own authority. It was said that although the necessity for the immediate operation of federal laws over all federal citizens could not be doubted, still the sentiment of the sovereign Rulers should be respected and they should be given an opportunity to pass the federal laws themselves. Sir Prabhashankar Pattani explained the position as follows: 'Whenever a law with regard to any federal subject is passed, and the States adopt it as their own legislation, and work on the same system, would there be any objection to that?'[1] And he added, that they were contemplating merely a union regarding legislation. The Maharaja of Bikaner in the course of the discussion reiterated the same point in his own emphatic way in these words: 'I am afraid I must make it clear beyond any possible doubt, that it is

[1] *Report* of the Proceedings of the First Federal Structure Sub-Committee, p. 219.

absolutely impossible to expect the States to agree to give up their sovereign rights of legislating.'[1] To these contentions, the answer that Sir Tej Bahadur Sapru gave was that what they were thinking of was not a Union but a Federation. He said, 'There is a world of difference between Federation and Union. If there is going to be a real genuine Federation, then it will be the Federal Legislature which will pass the law, which will be operative both in British India and in the States; and you cannot then say "we shall as a matter of courtesy pass the same legislation". That is not Federation at all.'[2] This matter was repeatedly raised by the Rulers until it was decided against them in the Act.

Rulers resist direct federal administration.

Similarly, in the matter of federal administration, the Rulers desired that they should have the right to administer federal laws and that the officers of the Federation should not exercise direct authority within the States. They argued that it would be a derogation of their sovereignty to allow instrumentalities not appointed and controlled nor directly responsible to them, to exercise power within their

[1] ibid., p. 231.

[2] ibid., p. 219.

States. It is usual in several Federations for the federal government to utilize the State administrative machinery for the execution of certain federal laws. But its position is strictly that of an agent and it is responsible to the federal government which controls, directs and may remove it. In practice this arrangement has been found to give rise to various legal and administrative difficulties and is not now in favour. The claim of the Rulers went much beyond what was ever known in previous Federations in that they desired that constitutionally the federal administration should be debarred from having anything to do directly with federal affairs within a State. Both in the matter of legislation and administration, they wished to retain ultimate authority in their hands. And, however inconsistent with federalism, they stuck to these ideas on the score of their sovereignty. We find large concessions made to the Rulers in this matter in the provisions of the Act.[1]

Units of the Federation. Further, many interesting views were put forward during the debates on the question as to what should constitute the units of the Federation. The Rulers feared the possibility of the provinces of British India acting as a bloc, and therefore

[1] See § 6 (2); § 124 (1) and (3); § 125.

they insisted that the provinces should come into the Federation not as a single unit but as several Federated Provinces. As for the States two proposals were put forward. Conservative Rulers led by the Maharaja of Patiala and the Maharaja of Dholpur suggested that the States should first be united in a confederation of their own, the principal if not the only purpose of which would be to serve as a unit of the Indian Federation. While they objected to the provinces of British India acting as a bloc,[1] they actively desired that the States should enter the Federation only as a bloc, its principle of unity being the preservation of the sovereignty of the princely order. The other view was that each State should enter the Federation independently upon its own terms, but that a broad distinction should always be kept in the scheme of the Federation between the provincial and the State units. 'We cannot agree to sink into a British Province' said the Maharaja of Bikaner.[2] The States are sovereign while the provinces have no trace of sovereignty. It may be that they 'become sovereign' later on by Parliament making them

[1] *Report* of the Proceedings of the First Federal Structure Sub-Committee, pp. 43 and 125.

[2] ibid., p. 77.

sovereign. But the constitutional position of the States, it was urged, should not be reduced to that of mere creatures of the Parliament of Great Britain.

The manner of bringing the Federation into existence. As regards the manner in which the Federation should be formally brought into being, the Rulers said that so far as they were concerned it should be by treaties between the Crown and each of them agreeing to enter the Federation on his own special terms. The Treaty is not to be with the provinces nor with the government of the Federation but with the Crown advised by the cabinet of England. It would be derogatory to their sovereign status either to submit to an Act of Parliament or to treat with a government established by such an Act. They further claimed that the operation of the various provisions of the Act in the States should be the result of this agreement alone, and that the Treaty should expressly specify the provisions so applicable. The Treaty should not be justiciable and should be the final authority as regards the State concerned in the Federation. If there should be any violation of its terms, the Rulers claimed that the *status quo ante* should be restored which, in other words, means that they should have the

right of secession. As regards amendment of the constitution, they claimed that every State which is affected by the amendment should severally consent to it before Parliament enacts it.[1] Otherwise it would involve the extension of the powers of the Federation beyond the scope of its treaty which should remain the only source of the authority of the Federation within the State.

Rulers not ready for Federation. The Rulers in urging all these contentions conceived of the Federation as being merely a collection of governments, with 'as limited a list of common subjects as possible'[2] and functioning through the States whether in the matter of legislation or administration. The Federation was not to act directly on all its citizens. And this collection of governments was liable to be broken up under certain circumstances by one or more States falling away from it for their

[1] H.H. the Nawab of Bhopal referring to future additions to the federal legislative list said, 'I should also like to express my view, which I think is the view of other Princes also, that any additions in the future to the original list of matters of common concern should go by a three-fourths vote, and by the consent of each of the federating units so far as that unit is concerned. I am referring to any future additions'. *Report* of the Proceedings of the Federal Structure Sub-Committee, p. 180.

[2] ibid., pp. 12, 45, and 234.

own reasons. Such a political organism had no germs of natural growth. When we analyse the proposals as they were put forward by the Rulers from time to time, we see that they were drawn more towards the idea of a confederation and were yet unprepared for a federal union with British India. They refused to recognize that in a system of federalism, their sovereignty was bound to be merged in that of the sovereign as regards the Federation as a whole, that the new constitution created one State and one citizenship over which the governments of the States and the Federation both acted independently and with equal force, and that the right of seceding from the Federation could not exist in any of its units. They viewed every question from the point of view of the maintenance and integrity of their sovereignty which a Royal Proclamation had declared to be 'inviolate and inviolable'.[1]

The Maharaja of Bikaner carried the matter to the extreme point of claiming that the powers of the federal authorities would be derived not by the surrender of the 'sovereignty' of the

[1] D. K. Sen, op. cit., pp. 8 and 51. See Royal Proclamation of King George V, 1921 (Butler Committee *Report*, p. 75). Inviolable it may be, but inviolate it is not even according to the Rulers.

States but merely by delegation from them, and invited the Lord Chancellor's expert opinion on the question to which his Lordship did not respond.[1] This theory of delegation, as I pointed out, is totally inconsistent with federalism but is the proper view of a confederal relation. The American constitution speaks of delegation of powers to the Federal and State Governments by the constitution, which is very different from saying that the Federal Government's powers are derived by delegation from the governments of the various units. His Highness went still further and, in an observation to which I have already referred, told the Committee that the Rulers would not agree to their subjects ever becoming British subjects.[2]

The Lord Chancellor's exposition of federalism and Rulers' impossible demands. Thus the Lord Chancellor's exposition of the principles of federalism at the commencement of the proceedings had to a large extent the effect of confirming the mistaken notions of the Rulers who made many claims and suggestions which a more

[1] *Report* of the Proceedings of the First Federal Structure Sub-Committee, p. 141.

[2] It is difficult to see how this could be prevented. They would become subjects under a constitution established by an Act of the British Parliament, and this would inevitably make British subjects of them.

accurate elucidation might perhaps have prevented. The members of the Committee very naturally looked up to him to guide them upon a matter which is fundamentally one of law. For a Federation is created by law and sustained by the loyal observance of that law. The law itself grows with the growth of the national spirit and helps the eventual transformation of the people to a condition of mutually beneficial unity. But when the Lord Chancellor put forward doctrines under which the most extreme isolationist ideas of the Rulers, all of whom were suffering from the *ideé fixe* of 'sovereignty', could be justified, the discussion took several unexpected turns and led to results which, however satisfactory as compromises, are difficult to reconcile with received principles of federal constitutions.

The gibe against constitutional purists. The Lord Chancellor anticipated this criticism and said in the third *Report* of the Federal Structure Sub-Committee, 'It will be easy for the constitutional purist, citing federal systems in widely differing countries, to point out alleged anomalies in the plans which the Committee have to propose to this great end; but the Committee, as they have stated in their first *Report*, are not dismayed

by this reflection.'[1] Indeed it is a fact that in most matters of principle other systems of federalism in countries differing widely, not only from India but equally from each other, show remarkable unanimity among themselves, however much they might disagree in matters of detail. And secondly, the Lord Chancellor's claim that his Committee were not dismayed by the consideration that political precedent and practice are opposed to their own original and untried solutions is evident from the assurance with which they have recommended them for experimentation upon vast millions of His Majesty's subjects.

Dangers of defects in the structure of the constitutional mechanism. But the dismay of students of institutions is real enough. They see in the confusion of the structure, many potent sources of weakness and many dangers which might and should have been avoided. The example of the United States of America is a warning. A constitution built with much

[1] *Report* of the Proceedings of the Federal Structure Sub-Committee of the Second Round Table Conference, Indian ed., p. 931. Incidentally it may be mentioned that in the *Interim Report* of the Sub-Committee to which this sentence refers, the Committee says that it is not dismayed by something else. (See *Report* of the First Round Table Conference, p. 200.)

greater care than the one we are considering and worked by a people far more united, wealthy and enlightened than the people of India has had to face many remarkable crises during its relatively short history, arising from the manner in which it has reacted to conditions of practical life. The ambiguities of the constitution lent themselves to various claims inconsistent with American national solidarity and progress, the settlement of which involved the country in a destructive civil war. More recently, the position with reference to the validity of laws passed to meet the economic situation, and the way in which the constitution hampers the activities of the Roosevelt Government, are fresh in our minds. In Canada and Australia likewise, the federal constitution and its interpretation have been responsible for raising many difficult problems in the political and economic life of the people. Thus weaknesses of the constitution arising from structural defects are not bare technicalities having interest for academically minded lawyers alone; they are fraught with practical consequences which may and do touch the everyday life of the citizen in countless ways. Lord Sankey's reference to constitutional purists however artful as a dialectical point is unfortunate, coming from a lawyer and

judge of his great eminence. It was for him to have constantly reminded the Committee of the principles in their juristic form, leaving it to the practical statesmen there to apply them without doing violence to the essential spirit of the venture. Legal and political principles like those of any other science are mainly rationalized and codified experience. For every violation of them, the community pays in suffering. History has repeatedly taught this lesson. As it is, the members of the Round Table Conference who met for the purpose of 'creating a nation by means of an Instrument of Government',[1] in the happy phrase of Lord Bryce, have helped in framing a constitution wherein are many elements of conflict, and whose practical working it is difficult to envisage without apprehension.

[1] Lord Bryce, *The American Commonwealth*, Vol. I, 1926, p. 28.

LECTURE III

SOME ASPECTS OF THE FEDERAL CONSTITUTION

Integral parts of the Indian Federal Constitution. The integral parts of the constitutional structure of the Federation of India are the Crown, the provinces of British India and such Rulers of Indian States as accede to the Federation. The process by which the federal constitution is to be brought into being, and the conditions under which its continued existence and growth are to be provided for, have involved issues of great complexity. The Federation of India is the creation of an Act of Parliament. But the competence of the federal authorities is derived from Parliament only so far as the provinces of British India are concerned. The authority of the Federation over the acceding Rulers and their States is derived from the Crown as distinct from Parliament. The procedure contemplated is that the several Rulers should vest in the Crown certain powers and jurisdictions which the latter would place at the disposal of the Federation for exercise over those Rulers

and their States. These two sets of powers of the Federation, the one derived from Parliament and exercised over the provinces and the other derived from the Crown and exercised over the Rulers, are kept distinct throughout the Act and give rise to different constitutional considerations.

States' accession to the Federation. The manner in which the Ruler of a State should effect his accession to the Federation has been laid down as follows :

' A State shall be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors ;

(*a*) declares that he accedes to the Federation as established under the Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other federal authority established for the purpose of Federation shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Federation, exercise in relation to his State such functions as may be vested in them by or under this Act ; and

(*b*) assumes the obligation of ensuring that

due effect is given within his State to the provisions of this Act so far as they are applicable therein by virtue of his Instrument of Accession.' [1]

Nature of the Instruments of Accession. The nature of the Instrument of Accession was the subject of a prolonged controversy between the Rulers and the British Government. The Rulers desired that it should be a bilateral agreement of the character of a treaty. They said: 'These treaties of Accession were intended to be bilateral in character, creating rights and imposing reciprocal obligations both on the Rulers of the Indian States and on the Crown. If the Rulers delegated certain portions of their sovereignty and internal jurisdiction to the Crown they also expected that the Crown would accept liability to preserve and safeguard the whole of their sovereignty and internal autonomy not specifically thereby safeguarded from any encroachment in future.' [2]

Their contention derived some force from the fact that in the discussions of the Round Table Conference and in the Secretary of State's evidence before the Joint Parliamentary Committee the expressions 'Instrument' and

[1] Government of India Act of 1935, § 6.
[2] Princes White Paper, p. 15.

'Treaty' were both used in reference to this document. In replying to this contention, the Secretary of State declined to recognize that this Instrument was a treaty. He said, 'These instruments are "bilateral" in so far as they have no binding force until His Majesty has signified his acceptance of them; but His Majesty's Government cannot on that ground accept the view that they are to be described as "treaties". Such rights and obligations as flow from the execution and acceptance of an Instrument of Accession are to be found in the terms of the Act, subject only to those conditions and limitations set out in the Instrument for which the Act makes provision. The Crown assumes no obligation by virtue of its acceptance of the Instrument of Accession other than those which are defined in the Act.'[1] The Rulers wished to stipulate that the treaty should provide for the transfer of certain of their powers and jurisdictions to the Crown for purposes of the Federation in consideration of which the Crown should guarantee protection of their rights in the field of paramountcy. The Secretary of State made it clear that these questions were irrelevant, except to the extent

[1] Princes White Paper, p. 32.

that where a power is transferred to the Federation the Crown would renounce whatever rights it may have had in respect of it, as Paramount Power, in favour of the Federation.[1]

Object of the Rulers. The insistence of the Rulers upon this matter is explained by the fact that they hoped, firstly, to preserve their title to sovereignty and, secondly, to secure the settlement of the vexed question as to the sphere of action of paramountcy by getting the Crown to enter afresh into a treaty involving the recognition of their status as they conceived it to be, and imposing the obligation upon it to protect and sustain that status. But the idea of a treaty is inappropriate in the circumstances. If the basis of the Federation is a treaty as respects a State, the implication is that the treaty may be denounced when the occasion justifies it, and sanctions may be invoked, in case of breach, only according to principles of international law. An organic union such as the Secretary of State explained the Federation to be, could not obviously be founded on a treaty. The Instrument of Accession, as finally provided for in the Act, is a declaration by a Ruler which on acceptance by

[1] See, Government of India Act of 1935 § 294(2).

His Majesty *ipso facto* brings the Ruler into the scheme of the federal constitution.

Rulers' demand that the Instrument and not the Act should govern their position in the Federation. The Rulers desired that the Instrument of Accession should specify the sections of the statute which would be operative in the State together with any conditions and limitations, so that the entire federal constitution as regards that State should be found in the Instrument. Their object was to dispense with the necessity for the Act as a source of federal constitutional law and thus eliminate Parliament from the scheme of Federation as far as they are concerned.[1] Several weighty objections were urged against this course. The confusion that would arise from having numerous Instruments of Accession as independent and original sources of law at the same time would paralyse the functions of the Federation. The Secretary of State said: 'Such a conception of Federation would imply the possibility not only of different constitutions for the States and for

[1] H.H. the Maharaja of Bikaner said: 'Anyhow we do not want an Act of Parliament to apply to the States, because Parliament does not legislate for the States.' (See *First Report* of the Proceedings of the Federal Structure Sub-Committee, p. 122.)

British India, but even a variety of constitutions among the States themselves.' [1] The rejection of this claim is of great constitutional significance. It is now clear that the federal constitution set up by a statute of Parliament is operative within the acceding States, and thus Parliament has begun to legislate directly for the States. The fact that the scope of this legislation is limited by the terms of the Instrument of Accession and that it is the result of agreement are of minor importance. When the authority of the Act of Parliament, whether by agreement or by necessary change of status, implied by the accession of the Ruler to the Federation becomes directly operative as law, strictly so called, even the notional sovereignty of the Ruler vanishes altogether.

Measure of federal authority in a State. The next question is as to the measure of federal authority in respect of an acceding State. From the outset, the British Government has been opposing the suggestions of the leading Rulers and their advocates that the powers of the Federation should be strictly limited to a short list of absolutely necessary subjects. It was felt that such an arrangement would not

[1] Princes White Paper, p. 31.

bring about that organic unity between the two Indias, which it was the object of every one to achieve through the federal constitution. The Rulers gave fight at every step and hedged every subject round with limitations and conditions peculiar to each one of them. Ultimately, when the Government of India Bill was introduced in Parliament Sir Samuel Hoare expressed the view of His Majesty's Government as that, normally, an acceding Ruler should come into the Federation for purposes of the first forty-five entries in the federal list appended in a schedule to the Bill. If he wished to be exempted or to impose conditions or limitations in respect of them, he should be invited to justify such a course. The British Government made it quite clear that no offer of accession which should render the Ruler's adherence to the Federation ineffective, and merely nominal, would be accepted by the Crown. As far as possible uniformity is intended to be preserved in this matter between one State and another. But it was freely recognized that variations would be inevitable and would have to be permitted as regards the limitations and conditions which would restrict the operation of certain provisions of the Act, reduce the number of federal subjects and

modify the exercise of the legislative and executive authority of the Federation in individual States.

Inequality among federal units. Here is a vital difference between the Indian Act and other federal constitutions. Except in the Imperial constitution of Germany, where Prussia predominated and inequality among the units prevailed, in progressive modern Federations equality is the rule. Prof. Willoughby, however, says, 'It is not essential to the federal form of government that the member states should all stand in exactly the same relations to the Federal Government as regards their respective autonomous powers or of their citizens to participate in the control and management of the general government',[1] but proceeds to cite only the instance of the German Empire in support of this doctrine. On the other hand, as he points out, the United States of America, Canada and Australia, which are the three great examples of modern federalism, observe the principle of equality. Quite apart from these precedents the soundness of the principle of equality as establishing mutual justice and reciprocity among the units is obvious.

[1] W. W. Willoughby, op. cit. p. 208.

Under the Indian Constitution, not only would the Rulers as a whole be bound less by the federal authorities than the provinces, but even among themselves, there would be differences. A very serious objection to inequality, in addition to the legal difficulties in determining questions of jurisdiction with reference to each State, is that it would tend to maintain the isolation of each State from the organic unity of the nation as a whole.

Instruments of Accession and Federation.

A consequence of this inequality among States is that the Instrument of Accession continues to be of force even after the accession is complete. Its terms are operative in the same way as contracts. In other Federations, whatever stipulations may precede the accession of a State, they are of no effect subsequent to its accession if they derogate from the political equality of the units in any manner. The subject has been considered frequently by the Supreme Court of the United States of America. In *Stearns v. Minnesota*,[1] the Court held that 'In an inquiry as to the validity of a compact between the United States and the State, this distinction must at the outset be noticed. There may be

[1] *179, U.S. 223.*

agreements or compacts attempted to be entered with by States or between the State and the nation in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the union enters therein in full equality with all the others and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status but only of the power of a State to deal with the nation or any other State in reference to such property.' The conditions and limitations contemplated in the Instrument of Accession may deal with questions of political obligation as well as those of property rights, and in both cases they are to be enforceable after accession. This again is a unique departure from federal practice which has been adopted to please the Rulers.

No provision for cancelling federal jurisdiction once assumed. The Act, however, provides that a Ruler may by a supplementary Instrument

of Accession accepted by His Majesty extend the scope of federal powers in relation to his State. The extension may be either by removing previously stipulated conditions and limitations or by transferring more subjects to the Federal Government. As the clause now stands, the only variation of an Instrument of Accession which is legally permissible is variation to extend the federal powers. The Statute does not provide for the resumption by a Ruler whether by agreement or otherwise, of a subject once surrendered to the Federation. This means that the federal jurisdiction is to go on expanding so that, at some time in the future, that government may become a fully national government representing India's unity. The pace may be slow, but of the direction of advance there can be no doubt in view of this arrangement.

Instrument of Accession and amendments of the constitution. The Act further lays down that it could be amended without affecting the Instruments of Accession only to the extent permitted in the second schedule.[1] It is unfortunate that the second schedule is not precisely worded. If the sections of the Act which may be so amended had been set out,

[1] Government of India Act of 1935, § 6(5).

there would have been greater certainty in the Act. As it is, several matters are mentioned each of which may conceivably cover more sections than one. One of the objects of this device, perhaps, is to prevent the introduction of new provisions which may have the effect of giving statutory form to the various conventions of responsible government. In drawing up the terms of this schedule, the idea was that Parliament should freely amend provisions which relate exclusively to the provinces but not amendments which may relate to the States without their individual consent. But the federal authorities are common to the States as well as the provinces and nearly all the vital provisions of the Act with respect to them are protected by this provision.

Importance of the clause. This clause is really the key to the constitution. In the course of discussions in Parliament, members raised many interesting points with regard to it. If an amendment in this field should be possible only with the consent of every single State, practical difficulties in the way of achieving it would be stupendous. The effect of the clause is to make the Act so rigid as to be almost incapable of any change under constitutional forms. Even more than other federal constitutions

the Act will need frequent amendments to adjust its complex machinery to the conditions of change and growth which are occurring with great rapidity among the various interests it is to serve. From this point of view the danger of this arrangement is obvious. It will be a direct incentive to revolution. The machinery for the alteration of the constitution provided in the existing Federations is rigid in different degrees, but nowhere is a *liberum veto* given to the units. The object always is to make certain that the preponderant opinion of the nation as a whole is in favour of the proposed change, but not to make changes impossible except where there is unanimity. Every federal constitution has, in fact, been amended time and again to meet fresh exigencies. It would be rash to suppose that the Indian Constitution Act is so perfectly drafted that it would not require any amendment in the future, or that where an amendment is absolutely necessary every single Ruler would be so reasonable as to agree to its being passed. The suggestion was made in Parliament that at least amendments which are supported by a majority of the Rulers might be taken as operative after Parliament passes it. But Sir Samuel Hoare firmly declared that it was not a

question of majorities but, being the provisions of a contract, the agreement of parties alone could vary them.

Clause merely procedural. It would be a natural inference from this provision that the basis of the Federation so far as the States are concerned is not law but an agreement evidenced by the Instrument of Accession. But such a theory is altogether inconsistent with ideas of federalism and is more apposite to a confederal relation. I submit, however, that the inference is not warranted because the provision should be looked upon merely as a procedure for amendment and not as determining status. The result of the accession of the States is really to merge them in the Indian Federation. It is not an association of independent States merely for certain specific common purposes, as the Secretary of State pointed out in a passage to which I have already referred,[1] but a new State created by an organic union of previously separate States. If this be so, the constitutional tie created is such as cannot be affected by what are merely procedural rules for regulating the machinery of amendment.

[1] *supra*, pp. 92-3.

The problem of States' secession from the Federation. His Majesty's Government was asked what would be the result if an amendment were made by Parliament in the federal part of the Act without the consent of a State. In other words, in what way would such a change affect its Instrument of Accession? In the course of his evidence before the Joint Parliamentary Committee, the Secretary of State stated explicitly that the Federation when brought into being would be perpetual and indissoluble. He argued that it would be fatal to the Federation if States or provinces were allowed to come in and go out at their pleasure.[1] In saying this he accepted what is universally true of all Federations, viz. that no constituent unit of a Federation can have the constitutional right to secede. But in his speeches in Parliament Sir Samuel Hoare took a somewhat different stand. He pointed out that the possibility of Parliament amending in a prohibited field is remote, and said, 'It certainly means that we cannot amend any part of the Bill which affects what is virtually the treaties

[1] Answer to Question No. 7843 in the Evidence of the Secretary of State for India before the Joint Parliamentary Committee on Indian Constitutional Reforms, unrevised Indian ed., p. 269.

under which the Princes come in. If we make such a change in the Bill as to strike at the basis of their Instrument of Accession, then obviously the agreement has been broken between the Princes and Parliament and the Princes are free.'[1] The clear implication of this is that there are certain circumstances under which a State may conceivably secede as of right. If this is true, then the merger of the State in the Indian nation cannot be considered to be complete for, except by revolution or other extra-constitutional means, no State can be split up into parts so that each part becomes politically independent of the others. This is a feature so inconsistent with the federal concept, that except for one other fact, it would almost justify the exclusion of the Act from the category of federal constitutions.

Paramountcy alone can reconcile contradiction in the Act. That fact is paramountcy. Quite apart from the Government of India Act of 1935, the relation between the States and the Crown are already of a constitutional character. The Act merely canalizes that relation and does not introduce anything fundamentally new. It would be open to the Paramount Power,

[1] House of Commons, Official Report, 27 February 1935, Vol. 298, p. 1211 (5th series).

acting for the benefit of all-India, to require the concurrence of a Ruler to any amendment of real importance. It is here that we must find the agency which reconciles the apparent contradiction in the Act, which provides at the same time for a Federation and a possible right of secession. Looked at from this point of view the claims of the Rulers as regards the nature of the Instruments of Accession and the rights and obligations arising therefrom lose much of their meaning. The Instrument of Accession like other so-called treaties would as between the Paramount Power and the State concerned be no more than a guide to political relations whose terms are alterable at the desire of the former. Throughout the discussion which preceded the Act this consideration appears to have been present in the background.

This clause is not a limitation of the authority of Parliament. It is also noteworthy that as the clause is worded it does not operate as a limitation on the power of Parliament but merely as a rule of construction. Indeed it is now well settled that Parliament cannot bind itself or its successors by any limitations of its own competence. Situated as the States are, in law and in fact, they may not be able to

object to a future Parliament taking a different course as regards the method of amendment by an appropriate amendment of the provisions of the statute. How the instruments would then stand 'affected' and with what consequence cannot now be foreseen.

Executive authority of the Federation. A State which has thus acceded to the Federation becomes subject to the legislative executive and judicial authority of the Federation. The executive authority of the Federation extends to a State in respect of matters in which the Federal Legislature may make laws for that State and subject to any limitations in its Instrument of Accession. The executive authority of every State is required to be so exercised as to secure respect for the laws of the Federal Legislature applying in that State. It is further provided that no impediment should be placed against the executive authority of the Federation by the Ruler and that the Governor-General should have the power to issue instructions to the Ruler in case any such obstruction were offered. These instructions are most unlikely to be disregarded but no provision has been made to meet such a situation in an individual case. For, it may not be practicable to call in the aid of the breakdown clauses in such a case.

The remedy has to be looked for rather in the discrete exercise of paramountcy.

States' claims considered. Several important States claimed in the course of the discussions that the executive authority of the Federation should be exercised in the States only through the agency of the administrative machinery of the State. This as we already saw [1] was on the ground of the sovereign dignity of the Ruler. The concession made to this feeling in the Act is substantial. A State may stipulate even in its Instrument of Accession that it should be entrusted with the right of administering any or all federal laws, and in such a case the only executive authority within that State would be the Ruler. But as he exercises only agency functions he would be accountable to the Governor-General and the Federal Legislature for the due discharge of his duties. The Secretary of State said in Parliament that there would be many occasions when questions relating to these agency administrations would be raised and discussed in the Federal Legislature. But, there seems to be no provision in the Act to meet the situation where the administrative machinery of a State or its financial resources

[1] *supra*, pp. 98-9.

become inadequate to the proper discharge of these responsibilities in the opinion of the Governor-General or the Federal Legislature. Nothing short of an alteration of the terms of the Instrument of Accession would give the federal authorities the right to intervene directly to enforce federal laws. If the Ruler does not agree to such an alteration there is no provision in the Act to get over the difficulty and the Paramount Power would have to be called in aid. On the other hand, if a similar situation should arise in respect of a province, the Act provides amply for controlling it. The point is of some importance considering that in most States executive administration has not yet been organized on sound lines and that mal-administration has frequently resulted in the intervention of the Paramount Power and the dismissal of the Ruler. This privilege of displacing the federal executive machinery should be most sparingly accorded and should further be subject to the condition that it may be revoked when the Federal Government thinks such revocation essential. Without the necessity of an amendment to the Instrument of Accession requiring the agreement of the Ruler the resumption of direct administration should be made possible by a stipulation in the Instrument,

at the discretion of the Governor-General-in-Council. It is desirable that remedies for difficulties arising within the Act should be found as far as possible in the provisions of the Act itself and not in paramountcy.

A point of importance. Following the practice of the British Parliamentary system the statute does not contain any reference to the responsibility of the federal executive to the legislature. The Instrument of Instructions would however direct the Governor-General to include in his ministry, so far as practicable, representatives of the Federated States. Convention will largely regulate the manner in which these representatives of the States on the ministry should be selected. It is a matter for consideration whether the representative of a State which does not accept the direct executive authority of the Federation can be properly chosen as a minister. The anomaly would be that this minister would be exercising administrative functions everywhere except in his own State. I think Their Highnesses would appreciate a matter of prestige even more than other considerations based on legal proprieties or substantial justice, and a poor British Indian Province might well ask what becomes of her prestige when a minister

hailing from a State administers her affairs while neither he nor his colleagues from British India may exercise any authority in that State.

States and the Federal Legislature. The representatives of the Rulers in the Federal Legislature are to be chosen by the Rulers themselves. The Act does not lay down the manner in which they should be selected. There are a few States in which popular institutions have been introduced and electorates have been organized. Even in these States there is no obligation on the Ruler to consult these popular bodies in the choice of the members of Federal Legislature. In one sense perhaps this is inevitable. Democratic and responsible government does not obtain in any State and if a popular electorate should return to the Federal Legislature a member who is not acceptable to its irremovable executive, the Ruler, the tendency might be to obliterate the Ruler in federal matters. This cannot well be because, as was often asserted, the constituent unit of the Federation is the Ruler himself and not the Ruler as representing his subjects. The Act studiously avoids any mention of the people of the States.

The powers of the Federal Legislature in respect of a State are to be confined to the limits

prescribed in its Instrument of Accession. Any provision of a law of a Federated State which is repugnant to a federal law applicable in that State is declared to be void. The Federal Legislature would be called upon to legislate in respect of British India in a much wider field than in respect of any State, particularly as the concurrent list is not applicable to the latter. The question was raised whether it is not unfair that the representatives of the States should discuss and vote upon these important and purely British Indian matters. While the Act does not distinguish between British Indian and other federal matters the necessity for observing certain conventions so as to ensure that the representatives of the States do not interfere in matters which do not concern them was fully appreciated. Ordinarily, the representatives of the States are not expected to discuss or vote on British Indian questions. It is not clear whether this doctrine is intended to be followed up to the extent of requiring that the representative of a State should abstain from the legislature when it is considering a subject which so far as it concerns that State alone is outside federal jurisdiction. Logically this should be so. While this is the general rule, the convention would be to permit all the

representatives of the States to vote on any question, British Indian or otherwise, if a decision upon it involves the fate of the ministry. Some delegates of the Round Table Conference suggested that statutory form should be given to these intended conventions and the British India delegation to the Joint Parliamentary Committee made definite proposals in this behalf. The *Report* of the Joint Parliamentary Committee records the fact that 'the States have made it clear that they have no desire to interfere in matters of exclusively British India concern' and leaves the rest to 'the common sense of both sides and the growth of constitutional practice and usage',[1] as any rigid statutory provision in matters of this kind would be undesirable. The *Report* further recommends the adoption of some such usage as now obtains in the House of Commons where exclusively Scottish questions are referred to a Committee of the House consisting of Scottish members alone. These are suggestions to meet difficulties which necessarily arise because of the inequalities of federal jurisdiction among the various units.

[1] Joint Parliamentary Committee *Report*, 1934, para. 217.

States and the federal judiciary. The Federal Court is to have both original and appellate jurisdiction. Its original jurisdiction in respect of a Federated State is restricted to cases where the parties to the action are the Federation, the Provinces or States and is confined to cases (*a*) involving the interpretation of the Act, Orders in Council issued thereunder and of the Instrument of Accession, (*b*) where the dispute arises in connexion with an agreement between the Ruler and the Federation in respect of his administration of federal laws, (*c*) involving matters in which the Federal Legislature has power to make law for the State, and (*d*) where by virtue of an agreement the State is under an obligation to submit to the jurisdiction of the Court. The Federal Court is also to hear appeals from a High Court in a Federated State in all these matters except that no such right of appeal from the State Courts is provided for in any case which concerns matters with respect to which the Federal Legislature has power to make laws. This is a significant omission with far-reaching consequences and was meant to placate the 'sovereign' Rulers. The appeal is to be in the form of a special case stated for the opinion of the Federal Court and the latter is also given the power to require the High Court

to state a case to it. The judgements of the Federal Court are to be declaratory in form and execution is to be left to the several High Courts. All courts in the Federation including those in the Federated States are required to act in aid of the Federal Court. It is provided that communications from the Federal Courts to the Ruler should be in the form of Letters of Request and the Court itself is not to communicate directly with the High Court of a State. The Rulers insisted upon the method of Letters of Request firstly because of the dignity due to them as sovereigns, and secondly because they did not like an outside tribunal such as they conceive the Federal Court to be, to have direct relations with their own courts.

Further appeal from the Federal Court to the Privy Council is provided for with and without leave in appropriate cases. The law as laid down by the Federal Court and the Privy Council is declared to be binding on the courts of a Federated State even in matters 'with respect to which the Federal Legislature has power to make laws in relation to that State', a vast and vitally important class of cases in which there is no appeal provided against the decisions of State Courts, either to the Federal Court or to the Privy Council. This arrangement is as

unique as it is unsatisfactory. If the rulings of a superior court were ignored or wrongly applied by any inferior tribunal bound by its authority, the former should always have the power to correct the mischief by exercising its appellate or revisional jurisdiction. But the duty cast upon a court to follow the judgements of another court without any judicial means of correcting any misapplication of such binding authority, arising from whatever cause, is one of imperfect obligation and may often occasion the interference of the executive in matters where it is least desirable. The Rulers were reluctant to accept the authority of the Privy Council, but they were assured that since the Government of India Act itself is a Parliamentary statute and the States are subject to that statute there is no additional derogation from their sovereignty involved in their submission to the Privy Council. They were also assured that since the authority of the Privy Council in respect of them would arise from their own agreement as expressed in the Instrument of Accession, their sovereignty was unaffected. Neither the argument nor the conclusion which is drawn from it would bear analysis, but every new affirmation of their sovereignty in whatever form helped to quieten the Princes. The

Australians like some of the Rulers, had objected to the Privy Council and more recently Canada legislated so as to prevent appeals in criminal cases to the Privy Council. The Irish Free State has withdrawn Irish cases altogether from the competence of the Privy Council. There was an influential movement in India for the purpose of creating a Court of Final Appeal in this country, thereby restricting and eventually abolishing the Privy Council in Indian cases. Judging from their dislike of the Privy Council now, it is not unreasonable to expect that Their Highnesses would pull their weight in favour of a Court of Final Appeal in India and the exclusion of the Privy Council as far as possible. But so long as India does not rise to the position of a Dominion, any efforts in this direction are unlikely to bear fruit.

Water rights. There is a class of case of great importance to an agricultural country like India, in which the Act excludes altogether the jurisdiction of Indian Courts. Many disputes have arisen in the past between the Indian States and British India regarding water rights, and the Paramount Power has assumed the right of finally deciding them after such inquiry as it thought fit. This has always given rise to much discontent on the part of the States

who wished that the principles applicable should be codified and applied uniformly. The Act now provides that if a complaint is laid with the Governor-General, by a province or a Ruler or any person affected, of interference with the use, distribution or control of natural sources of water, he may refer the matter to an Expert Commission. After due inquiry, in which the processes of the Federal Court may be utilized by the Commission, a Report will be submitted to the Governor-General who then issues his decision acting at his discretion unless before such decision is issued an aggrieved province or Ruler asks for a reference to the Privy Council whose judgement is finally binding. The provision for adjudication by the Privy Council in the place of the Secretary of State for India who is now the final authority in these matters, ensures judicial impartiality and the application of definite legal principles in the settlement of these important questions. The transference of the jurisdiction from the field of paramountcy to the regular processes of the Act is likely to prove so advantageous to the States that its realization may help to pursuade them to come within the scope of the Act more and more. But it is provided that an acceding State may exclude itself from these

beneficent provisions. It is to be hoped that every State which has any important interests in this connexion will see the wisdom of accepting the provisions of the Act.

Break-down provisions. The Act further provides that if the constitutional machinery of the Federation breaks down, the Governor-General may take over all or any of the powers of the various federal authorities except the Federal Court, thus superseding the Federal Legislature and ministry. The Rulers strongly resented this provision, as in their view the consequence of break-down should only be that they revert to their original position freed from the Federation.[1] They objected to the Governor-General in his discretion assuming sole authority over the States for an indefinite length of time, as it would defeat the very purpose for which they agreed to federate with

[1] H.H. the Maharaja of Bikaner said, 'What happens if the Federation—God forbid—does not work? Then we must be restored to our rights now surrendered to the Crown for an object that does not materialize.' (*First Report* of the Proceedings of the Federal Structure Sub-Committee, p. 122). 'If the break-down was not repaired and the machinery of Government restored to its normal structure within a certain definite time, the power transferred by the States must revert to the Princes owing to the failure of the Federation—the sole object of the transfer.' Princes White Paper, p. 15.

British India. In the federal executive and legislature they would be represented and their views would carry weight and influence, but a Governor-General acting in his discretion is responsible only to the Secretary of State and Parliament. The British Government saw the force of this contention and the break-down provisions as now framed are to operate for a maximum period of three years from the date of the Proclamation under this section, within which time it is expected that the Parliament would make necessary amendments in the Act to meet the conditions which resulted in the break-down. The Secretary of State said that in amending the Act, the provisions of Section 6, Clause 5 and the 2nd Schedule would be respected.

It is not easy to see exactly what kind of break-down is contemplated and how any amendment of the Act without touching the matters excluded in Clause 5 of Section 6 of the Act would be adequate ordinarily to meet the situation. What appears to have been in the mind of the Secretary of State is that the elected representatives of the Provinces and ministers chosen from British India may perhaps prove hostile to the constitution and bring about a failure of the constitutional machinery ; and in

such a case, amendment of provisions of the Act relating to the British Indian parts of the Act would alone be sufficient to restore the constitution to normal function. But what happens if the conduct of the Rulers or the political happenings in the States results in partial or total break-down of the constitution? Secondly, are the Rulers prepared to remain in a Federation in which, owing to the break-down of the constitution in the provinces, the Governors have taken over the functions of government to the exclusion of the popular legislatures and ministries? These are remote possibilities as things stand at present, but their discussion is not valueless as the break-down provisions themselves have been drawn up only against remote possibilities.

Defects of the constitution. These are some of the features of the federal constitution embodied in the Government of India Act of 1935. From the point of view of British India, the federal constitution so framed has many disadvantages. It makes privileged members of the States-units with special quasi-contractual rights and leaves the future development of the constitution much in their hands. The growth of democratic institutions and responsible government must to a large extent be delayed in

consequence. But Parliament has shown its unwillingness to deal with the British Indian problem apart from the Indian States. Indian statesmen like Sir Tej Bahadur Sapru considered any price not too high to bring the States into constitutional relation with British India leaving the rest to the future.

Prof. A. B. Keith's views. A different opinion was expressed by Prof. A. Berriedale Keith, the great authority on constitutional questions, in a letter to me of 26 July 1934 which I have obtained his kind permission to publish. He says, 'As the position presents itself to me, the Government of this country is satisfied that it would be dangerous to accord responsible government to British India and is only prepared therefore to accord such government, with large exceptions, to a government whose conservative character will be ensured by the measure of representation accorded to the Indian States. It declines to impose any obligation on the part of the States to move towards representative or responsible government, since such a movement might destroy the conservative character of the State representation. The extensive character of the central powers under the constitution is dictated by the desire to secure that the conservative forces in the country shall be in

a position to counteract any undue democratic tendencies in any province.

'The skill of the proposal is obvious, for to grant responsible government to the provinces while retaining the central government under British control would have created serious difficulties which are much diminished by substituting for British control of the centre that of conservative Indian elements which are opposed to the advance of democracy on principle. I fear that the Indian leaders who accepted the federal ideal acted unwisely so far as the extension of democracy is concerned, but, of course, they may have felt that democracy is out of place in India and that an Indian oligarchical regime is preferable to one mainly British. The decline of democratic institutions in Europe has no doubt filled many minds with grave doubts as to the possibility of the success of this system in India. Personally I should have preferred immediate responsible government in the provinces, without vital change at the centre, as the first step, leaving the States over until a Federation could be achieved on the basis of responsible government as an objective for the States.'

No guarantee of the progress of popular government in the States. In referring to the fact

that the constitution imposes no obligation upon the Rulers to introduce responsible government within their States, Prof. Keith lays stress upon an important feature of federal systems. Federal constitutions usually guarantee the maintenance of popular institutions and public order in the units. There is no guarantee that popular institutions would be developed in the Indian States. On the other hand, the Paramount Power which functions outside the Act has undertaken to maintain the authority of the Rulers perpetually. It may be considered a breach of proprieties for the Federal Government to countenance, much less encourage, popular upheavals in States in the cause of democracy, however legitimate they may be. Indeed the Federation is bound under the Act to help the Paramount Power to put down any such movements if required to do so by the latter.[1]

A new difficulty suggested against the introduction of democracy in the States. It is suggested that quite apart from the difficulties inherent in introducing responsible government in countries not steeped in British traditions, the special conditions of an Indian State in its relations with the Paramount Power

[1] Government of India Act of 1935, § 286.

constitute an impediment.[1] At present an autocratic Ruler of a State is able to do what the Paramount Power asks him to do. But it is said a responsible executive enjoying the confidence and acting under the mandate of the people of the State through their elected representatives may come into conflict with the Paramount Power and create critical situations. It is difficult to understand this argument. One would have thought that a responsible executive supported by public opinion would be in a stronger position than an autocratic Ruler in this matter if the welfare of the State and justice between the parties were alone to be regarded. At present a Ruler mindful of his State's interests and anxious to preserve its internal autonomy is still unable to keep off the usurpations of the Paramount Power of which one hears so many complaints. He has to submit to the usurpation because there is no organized public opinion in the State to back him in his opposition to any unjust exercise of paramountcy. On the contrary, the Ruler has often to rely on paramountcy as against his own people and the Paramount Power is not slow to extend its own powers at the

[1] See Appendix II, p. 152 *infra*.

expense of these helpless Rulers. The establishment of responsible governments in the State, therefore, seems to be the one way of restricting paramountcy to its proper field of action. From this point of view a patriotic Ruler with enlightened self-interest has everything to gain by accelerating democratic progress by intensive education and propaganda and timely reform. But there is nothing in the federal plan which gives any incentive to Rulers, nor fresh opportunities to work for democracy to the subjects of an Indian State.[1]

[1] Many leading Rulers and Dewans of States have declared their distrust of democracy. Sir Mirza Ismail, Dewan of Mysore, in a speech delivered on 21 June 1934 expressed his surprise that radical reforms should be advocated when parliamentary democracy was decaying everywhere, and added 'I am sure the conscience of the State feels that our present constitution is quite democratic enough for all practical purposes'. The Maharaja of Patiala, speaking as Chancellor at a meeting of the Chamber of Princes on 22 January 1935 said, 'While the Princes of India have always been willing to do what was best for their people, and will be ready to accomodate themselves and their constitutions to the spirit of the times, we must frankly say that if British India is hoping to compel us to wear on our healthy body politic the Nessus Shirt of a discredited political theory, they are living in a world of unreality.' The discredited political theory is of course, democracy. Such quotations could be multiplied. The Rulers are all averse to introducing democracy for one reason or another and they have made that position perfectly plain. See also Sir Akbar Hydari's

Conclusion. On the other hand, the federal constitution while appearing to lay the foundations of all-India unity on a democratic basis has introduced and stereotyped diverse fissile elements in the body politic. However well intentioned its promoters, the result of their labours is likely to dispose sections and interests of the Indian people against each other and render normal administration, not to speak of further constitutional progress, extremely difficult. The defects of the scheme are apparent and thoughtful minds should hasten to devise ways of improving it so that there may be no constitutional difficulties in the way of the realization of the ideal of a free and united India. In this great and noble task the patriotic Rulers no less than the people of India have to engage in helpful co-operation.

views in the *Report* of the Proceedings of the First Federal Structure Sub-Committee, p. 127.

APPENDIX I

LORD CHANCELLOR SANKEY ON FEDERALISM

Proceedings of the Third Meeting of Sub-Committee No. I (Federal Structure) held on Wednesday, 3 December 1930 at 11 a.m. and 2-30 p.m.

CHAIRMAN: 'The Post Office is a very important question, because it raises at once the whole subject of a federal system. Therefore, I think, we must at once come to grips with what is meant by a federal system, and what exactly people are prepared to do with regard to coming into a federal system. If you will forgive me reading an extract, I think it will be extremely useful to you. I have been looking up the subject in the *Encyclopædia Britannica*, the eleventh edition. Some of you may wish to look at it. You can get it at any of the libraries. I am not referring to the latest edition, because I think the matter is better put in the eleventh edition, the last edition but one. There is a very good article on Federal Government in that edition. It sets out

in the course of that article a number of general matters, and then it goes on to discuss quite briefly the nature of the federal system of Switzerland and the other federal systems of the United States of America, Canada and Australia. You will find it very useful, if I may venture to suggest it to you, to look at that article. You know perfectly well that as far as I am concerned I agree with you in wanting to give the fullest possible scope to the aspirations of India, but we must now come down to a concrete thing. It is no longer any use talking at large. May I read to you exactly what is said as to the meaning of a Federal Government; I think you will find it very useful:

'"Federal Government. A form of government of which the essential principle is that there is a union of two or more States under one central body for certain permanent common objects. In the most perfect form of Federation the States agree" (and I want to call particular attention to this) "to delegate to a supreme Federal Government certain powers or functions inherent in themselves in their sovereign or separate capacity, and the Federal Government in turn in the exercise of those specific powers acts directly not only on the

communities making up the Federation but on each individual citizen."

'Please follow the next sentence which is all-important. I am sure you will forgive me reading this because it goes to the heart of the matter.

' "So far as concerns the residue of powers unallotted to the central or federal authority, the separate States retain unimpaired their individual sovereignty, and the citizens of a Federation consequently owe a double allegiance one to the State and one to the Federal Government."

'I want to stop there a moment. Of course that only means to the Federal Government in respect of those matters which are federalized. I very much hope that in the categories which we are drawing up it will be found possible to carry out that, and that in certain matters everybody will owe an allegiance to the Federal Government. It may be necessary to make certain safeguards with regard to that allegiance.' [1]

The Lord Chancellor referring to this passage again the next day said that he was quoting from an article in a 'very authoritative book'. [2]

[1] See *Report* of the Proceedings of the First Federal Structure Sub-Committee, pp. 51-52.

[2] ibid., p. 112.

APPENDIX II

In the course of a speech delivered at the Cochin Legislative Council on 13 February 1936, Sir Shanmukham Chetty, K.C.I.E., the Dewan, made the following observations in reply to the demand for the introduction of constitutional reform by some members of the Council :

'What I want to impress upon this House is that ever since my advent into this State I have kept in my mind the problem of further constitutional reforms and I might assure the House that it will continue to occupy my attention. (Hear! Hear!) But I would ask Honble Members not to shut their eyes to the limitations imposed not merely upon myself but upon the State itself in the study of the problem of constitutional reforms. We are on the eve of very momentous changes of India as a whole. The elections to the provincial Councils will take place about the end of this year or at the beginning of next year and it is expected that soon after that Federation will be established. It is also expected that a great

many important States will join the Federation so as to make the idea of federation materialize. I made it plain, so far as I especially was concerned, that if I am here at the time when this question of federation comes up, I would unhesitatingly advise His Highness that the State of Cochin should enter the Federation. This is only my personal view and that view I hold at present in the light of the facts known to me. I do not know when the actual Instrument of Accession comes to be examined whether I will have to change that view. But I hope that such a contingency will not arise. Now, the establishment of the Federation in India and the accession of a number of States in the Federation will, in my opinion, hasten the day when responsible government will be established in a number of Indian States. It is impossible for the Indian States which will be thrown into the wider life of India to escape the influences of democratic institutions and responsible government, and, in my opinion, it is only a question of time as to when actually responsible government will come into operation in the Indian States. I have devoted some attention to the study of the problem of responsible government in British India. That

bristles with difficulties. But the problem of responsible government in an Indian State bristles with even greater difficulties than the problem of responsible government in British India, (Hear! Hear!) because here in the Indian States, we have to keep in mind, when considering the question of responsible Government, not merely the relation between the people and the Ruler, which in a State like Cochin is simple, but the relation between the State and the Paramount Power itself. It is a problem in constitutional law, which is of tremendous significance and importance, and I wonder how many subjects of Indian States who have applied their minds to the study of constitutional problems in their respective States have realized the difficulties that crop up in the way as a result of the necessary adjustments that have to be made between the State and the Paramount Power, when you think of responsible Government in the State. By treaties, by usages and by various other means, there have come into existence various rights and responsibilities between the Ruler of an Indian State and the Paramount Power. At present the Ruler of an Indian State is enabled to discharge those obligations because legally he is

an autocrat and the problem has to be thought out as to how far the Ruler of a State can reconcile that position of responsibility to the Paramount Power, when once he divests himself of that responsibility with regard to the internal administration of the State. In fact I am throwing out this suggestion, not with a view to put obstacles in the way but to offer a suggestion to the people of Cochin that they may study the problem of constitutional development from this aspect as well, because, as I have observed in the budget discussions about constitutional reform in Indian States, nobody has ever applied his mind to this problem of the relationship between the State and the Paramount Power, and necessary adjustments will have to be made in case a scheme of responsible government is to be introduced in the State. I do hope that this idea will be taken up and constitutional historians and students in the Cochin State will apply their minds to it. I make this appeal not merely with a view to arouse the academic interests of students of constitutional law but with a view to get practical suggestions myself as to how these various problems might be tackled. I might assure you that so long as I am here, it will

certainly be my endeavour to apply my mind to a study of this problem and I certainly shall offer to His Highness, the advice which in my opinion seems to be the best in the interests of the Cochin State as a whole.'[1]

[1] I am obliged to Sir Shanmukham Chetty for furnishing me with this authorized copy of his speech.

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